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REVERSE inquiries

Structured and market-linked product news for inquiring minds.

In This Issue

Banks and the BEAT

In case the reader has not heard, on December 22, 2017, President Trump signed tax reform legislation, commonly known as the Tax Cuts and Jobs Act (TCJA), into law.[1] The TCJA overhauls the U.S. international taxation system, generally moving the United States to a territorial system of international taxation for U.S. corporations. This article highlights one aspect of the new-look U.S. international taxation system as it relates to financial institutions, the base erosion anti-abuse tax (BEAT).[2] Although the BEAT provisions are intricate, the goal of the provisions is simple: to limit the deductibility of certain payments that reduce the U.S. tax base.

The BEAT is found in new Section 59A of the Internal Revenue Code of 1986, as amended (the "Code"). The new provision creates a "base-erosion minimum tax" on certain taxpayers for each taxable year, charged on a modified version of a taxpayer's taxable income. In simplified terms, the BEAT applies a 10 percent tax rate (5 percent for a taxable year that begins in 2018 and 12.5 percent after 2025) to a taxpayer's "modified taxable income," then credits the taxpayer for the taxpayer's general tax liability without the BEAT applied. The BEAT tax is one percent higher for a taxpayer that has a bank or registered securities dealer in such taxpayer's affiliated group (as defined Section 1504(a)(1) of the Code).

A corporation's "modified taxable income" is generally the corporation's taxable income as calculated under Chapter 1 of the Code, but with deductions for "base erosion payments" generally added back in. A "base erosion payment" includes deductible amounts paid or accrued to a related foreign party and amounts paid for depreciable property purchased from a related foreign party. The types of deductible payments that

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[1] Pub. L. 115-97, 131 Stat. 2054 (2017).

[2] For a more general analysis of the TCJA, please see our Legal Update titled "The Good, the Bad and the Ugly — Fundamental Tax Reform Is Enacted Into Law," available at https://goo.gl/yg68nb.

might trigger the provisions include interest, royalties, and payments for certain services. The definition of "related foreign party" is broad, including (a) a 25 percent or more owner of a taxpayer, (b) any related party (using a 50 percent test) of such owner, and (c) any other "related" party under Section 482 principles.

Importantly for financial institutions, excluded from the definition of base erosion payments are payments subject to U.S. federal withholding tax and certain "qualified derivative payments" (among other exceptions). The TCJA defines a derivative to mean any contract (including any option, forward contract, futures contract, short position, swap, or similar contract), the value of which, or any payment or other transfer with respect to which, is directly or indirectly determined by reference to (a) any share of stock,[3] (b) any evidence of indebtedness, (c) any actively traded commodity, (d) any currency, or (e) any rate, price, amount, index, formula, or algorithm. A "qualified derivative payment" is generally any derivative payment pursuant to a derivative a taxpayer marks to market, provided the taxpayer reports certain information to the Internal Revenue Service to identify the derivative as such.

The BEAT applies to corporations (other than regulated investment companies, real estate investment trusts and S corporations) that have (a) average annual gross receipts of at least $500 million over the preceding three-year period (gross receipts of foreign affiliates are only taken into account to the extent they are "effectively connected income") and (b) a base erosion percentage of three percent or higher (two percent or higher in the case of taxpayers that are members of an affiliated group that includes a bank or a registered securities dealer) for the taxable year.

The impact of the BEAT on financial institutions will depend on whether an institution is structured to include U.S. entities making deductible payments to non-U.S. entities. Debt and other payment streams between foreign subsidiaries of a multinational financial institution are not affected. Since the BEAT does not grandfather current structures, taxpayers now must reexamine their existing financing structures with the BEAT in mind.

FINRA Explains Its Enforcement Philosophy

The Financial Industry Regulatory Authority, Inc. (FINRA) recently combined its Market Regulation Legal team with its Enforcement team. As a result, the present Enforcement team will not only continue to handle cases referred to it by other regulatory oversight divisions, such as Member Regulation, Corporate Financing, the Office of Fraud Detection and Market Intelligence, and Advertising Regulation, but will also take on disciplinary actions on the trading-based findings of its surveillance and examination programs previously handled by the Market Regulation Legal team.[4] FINRA has stated that merging its enforcement teams provides a harmonized approach in handling cases. This is consistent with the goals of the FINRA360 initiative. In February 2018, FINRA Executive Vice President and Head of Enforcement Susan Schroeder

[3] Section 59A(h)(4)(B) of the Code specifies that American Depository Receipts and similar instruments will be treated as shares of stock.

[4] *See* FINRA360, Changes At FINRA, Consolidation of Enforcement Functions, available at https://goo.gl/PagyWG.

explained that combining the two enforcement teams clarified FINRA's existing philosophy of a unified approach in making its decisions and exercising its judgment.[5] FINRA wanted to enhance the transparency of its enforcement actions and the predictability of the resulting sanctions based on a given set of facts and circumstances.

FINRA'S ENFORCEMENT PHILOSOPHY

Recently, FINRA explained its enforcement approach. In determining if an enforcement action is appropriate, it assesses three factors: the demonstrated financial harm resulting from the misconduct, the significant impact to market integrity and the significant risk created by the misconduct. This risk may be evidenced by a high likelihood of harm, potential of widespread harm, the heighted risk posed by intentional or reckless misconduct, or a pattern of disregarding regulatory requirements called recidivism. An enforcement action aims "to fix something that is broken or prevent future misconduct." FINRA obtains restitution for harmed investors to make them whole again, and imposes sanctions to effectively address the root cause of the problem. This creates an overall incentive structure "so that non-compliance has more difficult and expensive consequences than compliance."[6]

According to Schroeder, a successful enforcement action is characterized by "thoughtful, balanced and timely investigations" in a transparent legal framework. Enforcement actions and examination findings should be based on specific regulatory requirements developed through the formal rulemaking process or official guidance.[7] In avoiding a perception of "rulemaking by enforcement," FINRA's expectations are being made clear to the stakeholders so that rule violations and the consequences in violating them are foreseeable.[8]

Schroeder's speech on FINRA Enforcement is available at https://goo.gl/UNeQ2L.

FINRA Zeroes in on Sales of VIX-linked Products to Retail Investors

In a targeted exam letter dated April 9, 2018, FINRA's Member Regulation Department initiated a review of sales practices related to products linked to the Chicago Board Options Exchange Volatility Index (VIX) sold to retail investors. The exam letter is intended to identify and mitigate sales practice risks associated with recommendations to non-institutional investors of VIX-linked products, including unsuitable recommendations, misrepresentations and the appropriateness of any required disclosures to customers.

[5] *See* Susan Schroeder, Remarks at the SIFMA Anti-Money Laundering Conference ("AML"), available at https://goo.gl/zbbAS7.

[6] *Id.*

[7] *See* Securities Industry and Financial Markets Association's letter to FINRA, May 8, 2017, available at https://goo.gl/USHaks.

[8] *See* Susan Schroeder, Remarks at the SIFMA AML, *supra* at note 3.

The exam letter echoes regulatory concerns over the years relating to sales of VIX-linked products, by both FINRA and the Securities and Exchange Commission (SEC) (*see* SEC Commissioner Stein speech, discussed on page 8 of this newsletter). The nine separate inquiries cover, among others, familiar areas of concern:

- Written supervisory procedures and training materials regarding the solicitation recommendation and supervision of VIX-linked products, with a focus on the member firm's due diligence process, disclosures and representations to customers; and the customer-specific and reasonable basis suitability process for VIX-linked products;
- Any restrictions with regard to soliciting customer purchases of VIX-linked products; and
- The member firm's process for testing VIX-linked products on its approved platform—how were the products tested under various market conditions? What was the testing methodology, and what steps were taken to mitigate risks?

Responses were due on April 20, 2018.

Amendments to FINRA's Mark-up Rule to Become Effective on May 14, 2018

FINRA Rule 2232 (Customer Confirmations) will now require member firms to disclose the amount of mark-up or mark-down it applies to trades with retail customers in corporate or agency debt securities if the member also executes an offsetting principal trade in the same security on the same trading day. The amended rule also requires members to disclose two additional items on all retail customer confirmations for corporate and agency debt security trades—(1) a reference to a web page hosted by FINRA that contains publicly available trading data for the specific security that was traded (and a hyperlink to such web site, if the confirmation is electronic) and (2) the execution time of the transaction, expressed to the second. One of the goals of the amendments is to provide retail fixed income investors with additional information about the costs of their transactions. The SEC approved the amendments to Rule 2232 in February 2017.[9]

MARK-UP DISCLOSURE REQUIREMENTS

New Rule 2232(c) requires members to disclose the amount of mark-up or mark-down (hereinafter, the term "mark-up" refers to mark-ups and mark-downs, collectively) the customer paid for a trade in a corporate or agency debt security, if the member also executes one or more offsetting principal trades in the same security on the same trading day that, in the aggregate, meet or exceed the size of the customer trade. These disclosures are only required for trades with non-institutional customers—i.e., retail.

FINRA notes that a disclosure obligation under Rule 2232(c) could be triggered by an offsetting principal trade executed by a member's affiliate. Specifically, if a member's offsetting principal trade is executed with a

[9] FINRA Regulatory Notice 17-08, in which the SEC approval and the rule amendments are discussed, is available at https://goo.gl/w74rgN.

broker-dealer affiliate and did not occur in an arm's-length transaction, the member is required to "look through" to the time and terms of the affiliate's trade to comply with the rule.

There are two exceptions to the mark-up disclosure requirements of Rule 2232(c). First, the disclosure is not required by principal trades that a member executes on a trading desk that is functionally separate from a trading desk that executes customer trades, provided that the member firm has policies and procedures in place that are reasonably designed to ensure that the functionally separate trading desk has no knowledge of the customer trades. Second, mark-up disclosure does not need to be provided for bonds that are acquired by a member in a fixed price offering and sold to non-institutional customers at the same offering price on the same day the member acquired the bonds.

METHODS TO CALCULATE AND DISCLOSE MARK-UPS

Members need to calculate the mark-up that is disclosed on a customer confirmation from the prevailing market price (PMP) for the security, consistent with existing FINRA Rule 2121 (Fair Prices and Commissions) and its supplementary material, particularly Supplementary Material .02 (Additional Mark-Up Policy for Transactions in Debt Securities, Except Municipal Securities). Where mark-up disclosure is provided on customer confirmations, Rule 2232(c) requires firms to express the disclosed mark-up as both a dollar amount and a percentage of the PMP.

REQUIREMENT TO DISCLOSE A REFERENCE OR LINK TO SECURITY-SPECIFIC TRADE DATA

For all trades with non-institutional customers in corporate and agency debt securities, regardless of whether mark-up disclosure is required, new Rule 2232(e) requires members to provide a reference, and a hyperlink if the confirmation is electronic, to a web page hosted by FINRA that contains Trade Reporting and Compliance Engine (TRACE), publicly available, trading data for the specific security that was traded, along with a brief description of the type of information available on that page. Each security-specific web page will include information about the prices of other transactions in the same bond, as well as additional market data and educational material that FINRA believes will be useful to retail investors.

TIME OF EXECUTION DISCLOSURE REQUIREMENT

Rule 2232(e) also requires members to disclose the time of execution, expressed to the second, for all non-institutional customer trades in corporate and agency debt securities. Providing customers the time of execution will assist them in identifying their individual trade when accessing the TRACE publicly available information.

UPDATE TO FREQUENTLY ASKED QUESTIONS

On March 19, 2018, FINRA provided updates to its FAQs Webpage for Rule 2232.10. Based on the updated FAQs, we present some hypotheticals.

We are an issuer with an affiliated broker-dealer that onsells to private banks and other wholesalers, so how will Rule 2232 affect us?

[10] The updated FAQs are available at https://goo.gl/dXM8Gt.

- The rule applies only to FINRA members, so, as an issuer, you will not be affected by the rule.
- The rule applies only to transactions in a principal capacity in a corporate or agency debt security to a "non-institutional customer;" i.e., a retail investor. In this particular fact pattern, the affiliated broker-dealer is transacting with institutional investors, so the rule's requirements would not apply.

We are a broker-dealer that always sells all of our notes in the initial offering and does not hold any notes in inventory. How would the rule affect us?

- The rule requires reporting of secondary offsetting transactions on the same trading day as the transaction with a retail customer.
- Sales out of a broker's inventory are not subject to the rule. Inventory sales are not offsetting transactions. *See* Rule 2232 FAQ 1.2.

We are a broker-dealer with an affiliated broker-dealer that is a wholesaler. Our affiliated broker-dealer sells notes to its affiliated private banking-focused broker-dealer and that entity sells the notes to its customers. Which one of these broker-dealers should calculate the PMP?

- The FINRA member that transacts with the retail customer is the entity that must provide the confirmation, which must include the PMP for the transaction. Consequently, the last broker-dealer in the hypothetical chain above should calculate the PMP.

Is PMP the same as the issuer's estimated initial value (EIV)?

- No, they are two different animals. The PMP should be calculated based on the methodology in FINRA Rule 2121 and Supplementary Material .02. PMP is based on market prices for the subject debt security. EIV is an issuer valuation based on SEC guidance and may or may not be the same as the PMP.

How should the PMP relate to the price at which secondary trades are transacted by an issuer's affiliated broker-dealer?

- Secondary trades of debt securities by an issuer's affiliated broker-dealer may be part of the PMP analysis as long as the objective of the analysis is to determine the price prevailing at the time of the customer's transaction. This analysis may occur at different times for different dealers—some may generate the PMP at the time of the customer's transaction using real-time data, while other dealers may generate the PMP at the end of the day, but using information available to it at that time to determine the PMP at the time of the customer's transaction. *See* Rule 2232 FAQ 3.4.

We are a downstream distributor of an issuer's structured notes. We purchase them from the issuer's affiliated broker-dealer and then sell the structured notes to retail investors. To which entity should we look for the PMP determination?

- As mentioned above, the PMP determination should be made by the FINRA member transacting with the retail customer; i.e., you.

As a FINRA member calculating the PMP for our confirmations, what types of compliance policies should we develop relating to our PMP determination?

- FINRA members may rely on reasonable policies and procedures to facilitate PMP determination, provided that those policies and procedures are consistent with FINRA Rule 2121 and applied consistently. *See* Rule 2232 FAQ 3.1. FINRA expects that a member will clearly explain in its policies and procedures its confirmation generation process, including the timing and role of each material step in the process. *See* Rule 2232 FAQ 3.4.3.

The SEC's Proposed Best Interests Rule—It's Here!

On April 18, the SEC released over 1,000 pages of new regulations intended to enhance protections for retail investors:

- Proposed Regulation Best Interest—a broker-dealer would be required to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, without putting the financial or other interest of the broker-dealer ahead of the retail customer;

- A proposed interpretation to reaffirm and, in some cases, clarify the SEC's views of the fiduciary duty that investment advisers owe to their clients;

- Proposed Form CRS would address investor confusion about the nature of their relationships with investment professionals through a new short-form disclosure document (maximum four pages)—a customer or client relationship summary. Form CRS would provide retail investors with simple, easy-to-understand information about the nature of their relationship with their investment professional, and would supplement other more detailed disclosures; and

- A proposal to restrict certain broker-dealers and their financial professionals from using the terms "adviser" or "advisor" as part of their name or title with retail investors.[11]

Proposed Regulation Best Interest would require a broker-dealer to discharge its duty to act in the best interest of the retail customer through compliance with three specific obligations:

- Disclosure obligation: disclose to the retail customer the key facts about the relationship, including material conflicts of interest;

- Care obligation: exercise reasonable diligence, care, skill, and prudence, to (i) understand the product; (ii) have a reasonable basis to believe that the product is in the retail customer's best interest; and (iii) have a reasonable basis to believe that a series of transactions is in the retail customer's best interest; and

[11] The SEC's press release, which contains links to Proposed Regulation Best Interest, Proposed Investment Adviser Interpretation and Proposed Form CRS Relationship Summary, can be found at https://goo.gl/TBL75W.

- Conflict of interest obligation: establish, maintain and enforce policies and procedures reasonably designed to identify and then, at a minimum, to disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives; other material conflicts of interest must be at least disclosed.

Proposed Regulation Best Interest is subject to a 90-day comment period.

SEC Highlights Efforts to Protect Retail Investors

The SEC held its Investor Advisory Committee ("Committee") meeting on March 8, 2018. The Committee highlighted the SEC's continued efforts to protect retail investors. SEC Chair Jay Clayton gave the opening address and reassured investors that the Committee shares a common and important goal—promoting the long-term interests of retail investors. Clayton provided encouraging words by stating that "[many] at the Commission keep two questions at the forefront of their minds when doing their jobs: How much money have we saved retail investors from losing? And, how much money have we returned to retail investors?" Clayton noted that the SEC should never lose sight of the fact that the lion's share of the approximately $30.5 trillion invested in U.S. equity markets and $39.3 trillion invested in U.S. fixed income markets belongs, directly or indirectly, to retail investors at the end of the day.[12]

Chair Clayton's address dovetailed with a recent speech by SEC Commissioner Kara Stein on February 23, 2018, which also focused on protecting retail investors.[13] In an environment where retail investors have access to all types of investments, Commissioner Stein asked whether it was appropriate that complex products, which may be understandable and appropriate for financial professionals, should be made available to retail investors.

Commissioner Stein highlighted two examples of complex products that may be confusing to a retail investor: structured notes linked to custom indices and exchange-traded products, particularly those linked to the VIX Index. According to Commissioner Stein, custom indices may not be appropriate underliers for products sold to retail investors because their methodologies are opaque (as compared to a broad-based index like the S&P 500® Index). VIX Index-linked products are also complicated, as the VIX-linked products are linked to an index of futures on the VIX, which, in turn, is an index of futures on the S&P 500® Index.

Commissioner Stein raised a number of concerns associated with these types of complex products:

- Do retail investors have access to these products?
- Do their brokers sell these products after a frank discussion about the possible outcomes and the risks?
- Do investors understand that the products are trading tools and not long-term investments?

[12] The opening address is available at https://goo.gl/JmxEQH.

[13] Commissioner Stein's speech is available at https://goo.gl/iqB8a3.

- Are investors aware that they bear credit risk by purchasing these products?
- Are investors aware that the exposure that they are getting is not necessarily the exposure that they seek?
- Is it even possible to have disclosure that adequately describes how these products work? (Commissioner Stein may have answered this last point, as earlier in her speech she noted that the disclosure may be perfectly clear.)

For answers, Commissioner Stein looked to the exchanges and industry professionals. Exchanges that list complex products "must be able to effectively surveil for problems." She asked, if they cannot do so, whether they should even be listing the products in the first place. One answer to Commissioner Stein's questions to the exchanges might be that the exchanges have listing rules with which any listed product (and its issuer) must comply. Those rules were approved by the SEC after being made available for public comment. Perhaps, in response to Commissioner Stein's speech, the exchanges will revisit those rules to determine whether the continued listing standards might need adjustment for the types of complex products she is concerned about. Industry professionals, such as lawyers, accountants, exchanges, investment advisors, broker-dealers and others, were reminded by the Commissioner of their role as gatekeepers. In that role, the professionals must remember that there is a real person behind each account number, with real goals, such as saving for retirement or a child's college education.

At the Committee meeting, in a panel discussion titled "Regulatory Approaches to Combat Retail Investor Fraud," Christian Luez, professor of economics and finance at the University of Chicago, called for a regulatory approach that would aim to (i) reduce investor demand, recognizing that there are different types and trading motives, and (ii) reduce the supply of fraudulent schemes by reducing profits and raising costs for fraudsters. Luez noted that retail investor fraud is costly, both to the individual and the system, and undermines market integrity.[14]

In the second Committee discussion, titled "Preventing Elder Investment Fraud: Assessing for Vulnerability to Financial Exploitation," the panel explained that 35% of people 71 years old and older have mild cognitive impairment (MCI) or full dementia. As a result, people with MCI make four times the financial errors than those without the condition. The panel advised several key points: (i) elders with cognitive impairment are at increased risk for financial abuse; (ii) education of family and patients about advance financial planning is crucial; (iii) assessment can be done with simple questions and observations; and (iv) when suspecting financial abuse, refer to a social worker and appropriate agencies.[15]

Overall, protecting retail investors, including vulnerable adults and seniors, continues to be a priority objective for the SEC in 2018.

[14] Discussion materials are available at https://goo.gl/Ys31nd.

[15] Discussion materials are available at https://goo.gl/KoHwzg.

Recommended SEC Pilot Program for Changing Block Trade Reporting Requirements Includes Structured Notes Trades

On April 9, 2018, the SEC's Fixed Income Market Structure Advisory Committee published a recommendation for a pilot program to change the current reporting requirements for block-size trades of corporate bonds. The pilot program would change the current volume caps and reporting time frames for investment and non-investment grade corporate bonds. Reporting of trades of structured notes will be affected, as most structured notes are investment grade corporate bonds. The pilot program would last for one year.

All trades in TRACE-eligible corporate bonds are eligible for participation in the pilot program. The dissemination cap for trades in investment grade corporate bonds would be raised to $10 million par value from $5 million par value. The dissemination cap for trades in non-investment grade corporate bonds would be raised to $5 million par value from $1 million par value.

All trades at or below their respective dissemination caps will continue to be disseminated upon receipt, and reported as soon as practicable, but no later than within 15 minutes of the time of execution. Trades at or above their respective dissemination caps will be required to be reported as soon as practicable, but no later than within 15 minutes of their time of execution. Those trades will be disseminated 48 hours after their execution time, subject to exceptions.

For capped transactions, the actual trade size will be made available three months after the end of the calendar quarter in which they are reported, as opposed to the current six-month post-calendar quarter waiting period.

The proposed measurement criteria for the pilot program include, for capped and uncapped trades, average daily trading volume, average daily number of trades, the price impact of block trades during the pilot program as opposed to the prior year period, transaction cost analysis, dealer behavior (proportion of matching trades compared to committing capital), and comparing all of these data points in both normal and stressful market conditions.

Good Disclosure Causes Early Delisting of ETN by Nasdaq

Issuers of inverse daily reset exchange traded notes (ETN) linked to the performance of the VIX generally warn investors that the ETNs are not buy and hold investments but are instead designed as trading tools for sophisticated investors to manage daily trading risk. One reason for this disclosure is that the principal amount of any daily reset ETN adjusts on a daily basis in response to movements in the VIX, and subtraction of fees. Another reason is that the SEC has specifically warned investors that inverse ETNs are not typically used as "buy-and-hold instruments" and highlighted the complexity of inverse daily reset ETNs.[16]

[16] *See* SEC Investor Bulletin Exchange Traded Notes (ETNs) (Dec. 1, 2015) at https://goo.gl/dCXFPj.

One issuer of a daily inverse ETN on the VIX followed all the rules, but nonetheless was delisted after the ETN's automatic acceleration event feature caused the issuer to call the ETN. The issuer's pricing supplement stated in multiple places that the ETNs were not buy-and-hold investments but were instead designed as trading tools for sophisticated investors to manage daily trading risk.

The timeline, according to the prospectus and an announcement by the issuer, was supposed to be as follows:

- February 5, 2018: an acceleration event occurred due to the intraday indicative value of the ETN being equal to or less than 20% of the prior day's closing value;
- February 6, 2018: the issuer announces the acceleration event;
- February 15, 2018: the accelerated valuation date for the ETNs;
- February 20, 2018: last day of trading on the Nasdaq; and
- February 21, 2018: the ETNs are accelerated and investors are paid.

Things took an unanticipated turn when the Nasdaq published an Equity Trader Alert on February 14, 2018, stating that trading of the ETNs would be suspended following the market close on February 15, 2018. The Nasdaq cited Listing Rule 5710(k)(iv)(C)(2)(c), which states, in part, that the Nasdaq will initiate delisting proceedings "if such other event shall occur or condition exists which in the opinion of Nasdaq makes further dealings on Nasdaq inadvisable." In this case, Nasdaq noted that the ETN would cease to be a tool that can manage daily trading risks because the cash payment due on the acceleration date will remain fixed after the accelerated valuation date.

The pricing supplement disclosed that, once an automatic acceleration event occurred, the value of the ETNs would remain fixed on and after the accelerated valuation date. As part of the listing process, issuers send their pricing supplements to the securities exchange for review. Nasdaq would have been aware, at the time of the initial listing, of the valuation process in the event of an automatic acceleration. However, the ETN lost two trading days on Nasdaq.

Announcements

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Suggestions? *REVERSEinquiries* is committed to meeting the needs of the structured and market-linked products community, so you ask and we answer. Send us questions that we will answer on our LinkedIn anonymously or topics for future issues. Please email your questions or topics to reverseinquiries@mayerbrown.com.

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