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MAYER BROWN CAPITAL MARKETS
TAXQUARTERLY

DON'T TAX YOU. DON'T TAX ME. TAX THAT FELLOW BEHIND THE TREE.*

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Editor's Note

Welcome to Mayer Brown's *Capital Markets Tax Quarterly* (*CMTQ*). This is a new publication for Mayer Brown's Tax practice, so let us explain what we're about.

On a daily basis, we here in Mayer Brown's Tax practice come across a lot of interesting and important US capital markets tax developments. As you know, for the really important ones, we put out our Mayer Brown Legal Updates. However, rather than relying solely on these, we thought that sharing current developments with you on a quarterly basis makes a lot of sense. That way, we can remind you of the big developments during the quarter and also throw in smaller, but still important, ones. From time to time, we also want to provide a little color commentary on the state of capital markets tax. The idea for this is to put the technical developments in context based on our decades (too many, some might say!) of experience in the taxation of capital markets transactions. Put it all together, that's *CMTQ*. Every quarter, we'll bring you a little commentary and a lot of news about capital markets tax. We hope you enjoy it and find it useful.

In This Issue

For our first issue, we couldn't help but reflect on how things have changed in our little corner of the tax world in the last two years! If you went to sleep in October 2016 and woke up today, you wouldn't believe there could be this much change (speaking of tax law, of course).

Almost exactly two years ago, the Obama administration's Treasury Department finalized Treasury regulations under Internal Revenue Code section 385 dealing with the distinction between debt and equity for federal income tax purposes. These were the first section 385 regulations since the early 1980s. The regulations (and the proposed regulations before them) sent the tax adviser community into overdrive with

* As described in the Editor's Note, this quote is attributed to, among others, Sen. Russell Long (D., LA).

stacks of client alerts and client proposals for assistance with what were sure to be back-breaking compliance obligations with, among other things, the section 385 debt-equity documentation rules.

Now, two years later, the section 385 regulations are on the ropes. As we discuss below, the Treasury Department has announced that it's withdrawing the section 385 documentation rules which were slated to be effective January 1, 2019. Also, as we note below, the Treasury Department has announced that it is studying what changes to make to the other parts of the section 385 regulations.

Of course, it also occurred to us that Code section 385 just can't get a break. Enacted by Congress in 1969, the first set of section 385 regulations was issued, finalized and then withdrawn in 1983. Depending on what happens, the end result of 60-plus years of debt-equity back and forth will be no regulations at all or some very limited regulations at best (or worst, depending on your perspective).

Putting section 385 aside, the biggest news is that tax advisers are still trying to understand what happened in the Tax Cuts and Jobs Act ("TCJA"). New tax benefits and some really ugly potential tax detriments are surfacing all the time. Treasury Department guidance on a host of provisions is starting to emerge. In fact, we raced to complete this edition of *CMTQ* for fear the government would release regulations under the interest deduction limitation rules of Code section 163(j) and we would have to turn *CMTQ* into a book!

Also, in this issue of *CMTQ*:

- We recount the Second Circuit Court of Appeals decision in *McKelvey v. Commissioner* dealing with an extension by McKelvey, the founder of Monster.com, of a variable prepaid forward shortly before death. While McKelvey won in the US Tax Court, that decision was overturned by the Second Circuit in late September.
- We provide an update on mark-to-market ("MTM") taxation; as we recount below, this was not included in TCJA but is still lurking in the wings in Washington DC.
- We also cover other developments, including:
  - Guidance on what new Code section 451(b) means, or doesn't mean, for accrual of market discount
  - Guidance on the "willfulness" standard in the FBAR rules
  - Guidance on MBS restructurings

* By the way, the ditty "don't tax you, don't tax me, tax that fellow behind the tree" below our masthead has a long history in American tax law. Originally it went "Congress, Congress, don't tax me, tax that fellow behind the tree." More recently it has taken the form on our masthead and has been attributed to Sen Russell Long (D., LA), former long-time chairman of the Senate Finance Committee, among others. So, *CMTQ* will give you not only current tax developments but a little historical perspective as well.

Second Circuit Overturns *Estate V. McKelvey*

On September 26, 2018, the Second Circuit Court of Appeals overturned a taxpayer favorable 2017 Tax Court ruling involving an extension of variable prepaid forward contracts ("VPFCs"). In doing so, the Second Circuit made new law; however, its decision also raises new questions about the modification of non-debt derivatives.

In September 2007, Andrew McKelvey, founder of Monster Worldwide, Inc ("Monster"), the popular employment website, entered into two VPFCs with two different banks. Each VPFC provided for an upfront cash payment to McKelvey and settlement in September 2008. McKelvey was required to settle the VPFCs by delivering Monster common stock or (at McKelvey's election) cash. In each case, the number of shares or amount of cash that McKelvey was required to deliver was subject to a cap and a floor. At the time McKelvey entered into the Bank 1 contract, Monster stock was $32.91 per share. When he entered into the Bank 2 contract, Monster stock was $33.47 per share. McKelvey pledged the maximum number of shares under each VPFC as collateral. The IRS and McKelvey agreed that these initial transactions created VPFCs that were subject to open transaction treatment under Revenue Ruling 2003-7.

Here is a summary of the original VPFCs:

Counterparty/Date	Maximum # of Shares	Price on Execution	Floor in Contract	Cap in Contract	Upfront Payment on VPFC
Bank 1 (September 11,2007)	1,765,188	$32.91	$30.46	$40.58	$50,943,578
Bank 2 (September 24, 2007)	4,762,000	$33.47	$30.89	$35.77	$142,626,185
Total	6,527,188				$193,569,763

Ten months later, in July 2008, McKelvey paid roughly $11.7 million to Bank 1 and Bank 2 to extend settlement until early 2010. At the time, Monster stock was at $18.24 (when the Bank 1 contract was extended) and $17.28 (when the Bank 2 contract was amended).

McKelvey died in November 2008 after the VPFCs were extended. His estate settled the contracts in 2009. In the final income tax return, his estate reported no gain or loss on the extensions. The estate received a basis step up in the Monster shares to fair market value at death. Therefore, when the VPFCs were settled, McKelvey recognized no gain or loss. All told, McKelvey received the upfront payments of $193,569,763 and paid no federal income tax.

After an audit, the IRS asserted that when the VPFCs were extended McKelvey realized (i) a short-term capital gain of $88,096,811 on the short VPFC, and (ii) a $112,789,808 long-term capital gain on the constructive sale of the long shares under section 1259.

The first question before the Tax Court was whether the extension was a section 1001 event. Section 1001 provides that gain or loss shall be recognized on the sale or exchange of property. It does not, however, provide a definition of "property," so the Tax Court analyzed the term's definition in *Black's Law Dictionary* and its use in case law. The Tax Court concluded the original VPFCs did not constitute "property," because the only material property right that the VPFCs provided McKelvey were the initial rights to cash. Accordingly, because McKelvey received the cash prepayments before the extensions, the contracts were "only obligations to deliver the requisite number of shares or the cash equivalent" by the time the extensions occurred.

The Tax Court also considered whether the amended contracts resulted in a constructive sale under section 1259. Generally, a constructive sale occurs where a taxpayer with an appreciated financial position enters into a forward contract to deliver a substantially fixed amount of property. The Tax Court held section 1259 did not apply because the only contracts to be considered were the original VPFCs, and the government had basically acknowledged section 1259 did not apply to those contracts. It also implied there could be no constructive sale because McKelvey always had the right to cash settle the VPFCs or settle with shares other than the collateral shares and, therefore, the basis of the property “sold” could not be determined.

The Second Circuit both agreed and disagreed with the Tax Court. On whether McKelvey recognized short-term capital gain when the VPFCs were extended, the Second Circuit first agreed with the Tax Court that, on the extension dates, the VPFCs were not "property" and therefore, there was no section 1001 event. However, the Second Circuit went further and determined there could still be a "termination" of the VPFCs under section 1234A. Section 1234A provides that gain attributable to "the cancellation or other termination" of a right or obligation with respect to property is treated as gain from the sale of such property. Although the Tax Court had not ruled on this issue, the IRS raised it on appeal and, because the taxpayer indirectly raised it in the lower court proceeding, the Second Circuit considered it. The Second Circuit applied the “fundamental change” doctrine[1] and ruled that the extensions "resulted in amended contracts that replaced the original contracts…" pointing to the fundamental change in the contracts (17- and 16-month extensions with different valuation dates) and the $11 million paid to extend the contracts. However, the Second Circuit stopped short of saying the amendment was a termination, sending that issue back to the Tax Court: “Whether the replacement of the obligations…with the obligations in what we hold are new contracts satisfies the criteria for a termination of obligations that gives rise to taxable income…and the amount of such gain are issues that we leave for determination in the first instance by the Tax Court on remand.”

On whether McKelvey recognized long-term capital gain on his Monster shares under section 1259, the Second Circuit disagreed with the Tax Court. Having held that the extended contracts were new contracts, the Second Circuit then turned to whether the number of shares to be delivered was “substantially fixed.” In a case of first impression, the Second Circuit adopted a probability analysis to determine whether the number of shares was “substantially fixed.” The Second Circuit relied on an IRS expert witness,[2] who concluded that, on the extension dates based on the Black-Scholes option pricing theory, there was an 85.10% chance (for the Bank 1 VPFC) and an 87.13% chance (for the Bank 2 VPFC) that the closing price would be below the floor price. If the floor was never reached, then the number of shares, again viewed at the extension date, was substantially fixed. The Second Circuit thus held that the probability analysis meant that McKelvey entered into a forward contract to deliver a “substantially fixed” amount of property when he amended the contracts. Accordingly, there was a constructive sale of the collateral shares.

Implicit in the Second Circuit’s section 1259 holding is that section 1259 could be triggered even though there was no section 1001 event with respect to the VPFCs. Instead, the court used its conclusion that the extension contracts were new contracts under the “fundamental change” doctrine to allow retesting them on the extension date under section 1259. While the McKelvey estate’s position was that no income tax was owed either on the extensions or on delivery of the Monster shares under the VPFCs (because of the basis step-up at death), the Second Circuit's opinion raises the horrifying possibility that McKelvey's estate would pay tax both on the long shares (under section 1259's constructive sale rule) and on the short position in the VPFC (under section's 1234A termination rule). That will depend on whether the Tax Court accepts the Second Circuit’s invitation to find a section 1234A termination even where there is no section 1001 event.

Finally, in a concurring opinion, Justice Cabranes emphasized that the Second Circuit’s decision on the section 1001 issue only applied to nondebt financial instruments and did not change the application of existing Regulation section 1.1001-3 to holders and issuers of debt instruments. The concurrence appears to try to address concerns that an obligor on a debt instrument could not have a section 1001 event when the debt instrument is modified under the Tax Court’s and Second Circuit’s analysis that section 1001 only applies to changes in property, not obligations.

The Second Circuit's reliance on a probability analysis is a novel approach to interpreting a tax statute involving financial instruments. Also, the finding that an 85% probability of being fixed is "substantially fixed" (and the court's implication that a 15% probability is "remote") also makes some new law in the taxation of financial instruments. Derivatives tax advisers will be considering whether the decision is a narrow one merely interpreting "substantially fixed" under Code section 1259(d) or whether it has broader implications, for example, in determining whether certain payouts on structured notes are more likely or less likely to occur and what that means for characterization of these instruments for federal income tax purposes.

Finally, in our experience, because there were no regulations dealing with non-debt derivatives under section 1001, tax advisers gravitated toward Regulation section 1.1001-3 (modification of debt instruments) principles to determine whether a non-debt derivative was a new contract when modified. The Second Circuit’s analysis of both the section 1001 issue and the section 1259 issue in McKelvey now bring the modification of non-debt derivatives into focus in an unexpected way whose implications remain to be fully understood.

Thomas Humphreys and Brennan Young

Derivatives Mark-to-Market Treatment in Our Future?

Close observers of the TCJA will remember that MTM treatment of derivative financial instruments was not included. Mark-to-market has been discussed for years; way back in 2013 then-Representative Dave Camp (R., MI) released a “discussion draft” of proposed tax reform legislation requiring derivative MTM treatment for all taxpayers (not just dealers and electing traders).[3] Since then, the proposal has taken various forms, the latest being the Modernization of Derivatives Tax Act (“MODA”), introduced by Senator Ron Wyden (D., OR) on May 2, 2017. Although some had speculated that MODA would be included as a revenue raiser for the TCJA[4] which became law on December 22, 2017, neither the House nor the Senate bills included a version of MODA. Still, MTM remains a possibility, even as part of so-called “Tax Reform 2.0.”

MODA would require any taxpayer that holds a derivative at the end of the taxable year to treat the derivative as having been sold for its fair market value, realizing gain or loss for federal income tax purposes. A “derivative” is defined as “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" stock, partnership or trust interests, debt, certain real property, actively traded commodities, currencies, any rate, price, amount, index, formula or algorithm, and any other item prescribed by the Treasury Department. However, certain contracts are excluded, including certain contracts with respect to real property, insurance contracts and derivatives received in exchange for services. MODA's broad reach led the New York State Bar Association to publish a February 2018 report that recommended narrowing the scope of any MTM regime to actively-traded derivatives and derivatives over actively-traded property.[5]

Even if MODA's scope were narrowed, MTM treatment would have a major impact on investors in derivatives. Furthermore, the prospect of Congress including MTM treatment for derivatives in tax legislation is likely to remain a possibility for the foreseeable future, conceivably such a provision could be tacked on to any legislation that needs a revenue raiser to offset spending. In April 2016, the Joint Committee on Taxation estimated that an earlier version of MODA would raise $16.5 billion over 10 years. Of course, MTM remains controversial, not the least because of the complexity and burden it would put on taxpayers and on brokers who may have to report year-end values. In a way, MODA reminds us of the Code section 6221-6227 partnership audit rules that sat around for years and were abruptly added to the Bipartisan Budget Act of 2015 for revenue raising purposes (with a 2018 delayed effective date). Of course, the one group that the prolonged MODA saga is making happy are the tax advisers like yours truly who continually get to remind their clients that MTM is still out there.

David Goett

Dividend Equivalent Phase-in Gets Another Two-Year Extension

As expected, on September 20, 2018, the IRS released Notice 2018-72, which further extends the phase-in of regulations under section 871(m) of the Code. Specifically, of most importance to the structured products industry, non-Delta-One transactions are now not captured by the regulations until January 1, 2021. In addition, the Notice also extends (1) the application of the simplified standard for determining whether transactions are "combined transactions," (2) relief for qualified derivatives dealer reporting and (3) the transition out of the qualified securities lender regime. For a more detailed discussion of the Notice, see our Legal Update.[6] *CMTQ* can only wonder whether 2021 really means that Delta One will be the place where the section 871(m) regulations come to rest… .

Brennan Young

Withdrawal of Section 385 Documentation Regulations

On September 21, 2018, the Treasury Department and the IRS released proposed regulations that provide for the withdrawal of section 1.385-2 and other conforming modifications. Section 1.385-2 sets forth the minimum documentation requirements that must ordinarily be satisfied for corporate taxpayers to treat certain obligations among related parties as debt for federal income tax purposes.

These requirements would have been applicable to purported debt transactions beginning in 2019. If applicable, taxpayers would ordinarily be required to prepare and maintain documentation of indebtedness factors analogous to that in third-party transactions, including evidence: (i) of an unconditional and legally binding obligation to make interest and principal payments on fixed dates; (ii) that the holder had the rights of a creditor to enforce the obligation, including having liquidation rights superior to those of shareholders; (iii) of a reasonable expectation of the borrower's ability to repay the loan; and (iv) that the parties' actions were consistent with a debtor-creditor relationship. Failure to meet these requirements could result in debt being reclassified as stock, making interest payments on the instrument ineligible for interest expense deductions.

The removal of the documentation requirements will tend to affect the largest corporation tax filers. These documentation requirements, if effective, would have applied only to related groups of corporations in which the stock of at least one member is publicly traded or when the group's total assets exceeds $100 million or annual total revenue exceeds $50 million.

Prior to the proposed removal of the documentation requirements, the IRS received a number of comments from taxpayers that suggested modifications to the Code section 385 regulations. Many commentators observed that the result for failing to satisfy the documentation regulations was too harsh and not proportionate to the concerns addressed by the regulations. Taxpayers also suggested excluding transactions done in the ordinary course of business and transactions between commonly-held consolidated groups. The Treasury Department and the IRS indicated that they would continue to study these issues and might propose a modified version when that study is complete. The Treasury Department and the IRS noted that the modified version, if any, would be substantially simplified and would have a prospective effective date to allow sufficient lead-in time for taxpayers. Nevertheless, it appears that the need for such rules has been reduced since the enactment of the TCJA. The 21% corporate tax rate has reduced the benefits of interest expense deductions and TCJA's new international tax provisions may have further reduced the need for corporate inversions – the reason the regulations were issued to begin with.

While the withdrawal of the documentation regulations is a welcome relief for taxpayers, the distribution and funding rules found in regulations sections 1.385-3 and 1.385-3T still remain in place. These regulations generally treat as stock certain debt that is issued by a corporation to a controlling shareholder in a distribution or in another related-party transaction that achieves an economically similar result.[7] In October 2017, Treasury delivered a report to President Trump that proposed to revise both the documentation regulations and the distribution regulations, but in the case of the distribution regulations the Treasury report said the Treasury's actions would depend on the impact of tax reform. Now that the TCJA is here and the documentation regulations are on track to be withdrawn, it is unclear what further action Treasury will take with respect to the distribution and funding regulations.

Guoyu Tao and Brennan Young

Section 451(b) Inapplicable to Accrued Market Discount

On September 27, 2018, the US Internal Revenue Service released Notice 2018-80 announcing that the Treasury Department and the IRS intend to issue proposed regulations providing that market discount is not subject to accelerated income inclusion under section 451(b) of the Code. For a more detailed discussion putting this Notice into context, see our recent Legal Update.[8]

Brennan Young

Banks and Section 199A Deduction

The TCJA included new section 199A, which provides non-corporate taxpayers with a 20% deduction for "qualified business income" earned from a partnership, S Corporation or sole proprietorship. Qualified business income is limited to certain domestic qualified items of income with respect to a qualified business. A qualified business is any trade or business other than a specified service trade or business or performing services as an employee. Specified service trades or businesses that will not be eligible for the deduction include health, law, accounting, brokerage services, investment management and certain financial services, such as trading in stock or securities. The TCJA provides bespoke exceptions for engineering and architecture. On August 8, 2018, the IRS issued proposed section 199A regulations, which, among other things, narrowly defined "financial services" to allow individual owners of banks treated as pass-throughs for US federal tax purposes to use the deduction. Specifically, the proposed regulations state that "the making of loans" will not be considered a financial service under the regulations. It is unclear what the line is between financial services businesses and banking, causing confusion for certain industries. For example, on August 31, 2018, a lending association sent a comment letter to the IRS on the proposed regulations requesting that the final regulations make clear that independent mortgage bankers are allowed to use the deduction.

When considering this guidance, *CMTQ* reminds the reader that most banks are treated as corporations for tax purposes under the Treasury Department's entity classification regime. Thus, only those banking entities that are not treated as corporations (or that are treated as S corporations) can qualify as pass-through entities. For the individual owners of these banks, the Proposed Regulations mean an immediate 20% tax cut.

Brennan Young

PMTA 2018-013: Guidance on "Willfulness" Under FBAR Rules

In Program Manager Technical Advice 2018-013, the IRS concluded that the standard for willfulness under 31 USC 5321(a)(5)(C) is the *civil* willfulness standard (instead of the criminal willfulness standard), and that such standard includes not only knowing violations of the FBAR requirements, but willful blindness to, as well as reckless violations of, the FBAR requirements. Willful blindness is established, according to the IRS, "when an individual takes deliberate actions to avoid confirming a high probability of wrongdoing and [when he] can almost be said to have actually known the critical facts." In the tax reporting context, the government can show willful blindness by evidence that the taxpayer made “a conscious effort to avoid learning about reporting requirements.” The IRS also said that the recklessness standard is met “if the taxpayer (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.”

For the standard of proof for civil FBAR penalties, the courts are uniform in holding that the government bears the burden of proving liability for the civil FBAR penalty by a preponderance of the evidence.

Given this guidance we thought it would be a good time to remind people that the FBAR deadline, which used to be June 30 was changed this year to April 15, as mandated by the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015.[9]This legislation also provides a maximum six-month extension of the filing deadline.

The CMTQ Team

Rev. Rul. 2018-24: IRS Guidance for MBS Restructurings

On March 28, 2018, the Federal Housing Finance Agency (“FHFA”) announced that Participations Certificates (“PCs”) issued by the Federal Home Loan Mortgage Corporation (“Freddie Mac”) and Mortgage-Backed Securities (“MBSs”) issued by the Federal National Mortgage Association (“Fannie Mae”) would be standardized.[10] Freddie Mac and Fannie Mae will issue Uniform Mortgage Backed Securities (“UMBS”) instead of PCs and MBSs beginning June 3, 2019. All UMBS will have a 55-day “Remittance Cycle,” which is the time between payment on the mortgage and the distribution of cash to investors.

By way of background, Freddie Mac purchases mortgages and participation interests in residential mortgage loans (“Mortgages”) that were originated by unrelated financial institutions, and packages them in trusts. Freddie Mac sells interests in the trusts called “Participation Certificates” to investors and Freddie Mac serves as trustee, depositor, master servicer, administrator and guarantor with respect to the PCs. Fannie Mae also purchases Mortgages from unrelated financial institutions and issues MBSs, whose terms and conditions are substantially similar to those of PCs but the key difference is that a holder of a Fannie Mae MBS receives payment ten days later than a holder of a Freddie Mac PC.

Freddie Mac will allow a PC holder to exchange the PC for UMBS that represents the same proportionate undivided beneficial interest in the pool of Mortgages as such holder’s PC. PC’s have a 45-day remittance cycle. The UMBS that is received in the exchange will have the same terms as the existing PC but will have a 55-day Remittance Cycle. Freddie Mac will make a one-time Make Whole Payment to PC holders that choose to convert their PCs to UMBS to compensate an exchanger for the difference in receiving principal and interest payments 10 days later. In addition, for a limited time, Freddie Mac will also pay an “Inducement Fee” to those holders who make the conversion election.

On August 17, 2018, the IRS published Revenue Ruling 2018-24 which addresses whether an exchange of a Freddie Mac PC for UMBS (a “Conversion”) would constitute a taxable exchange of property for purposes of section 1001 of the Code and trigger a gain or loss. The IRS ruled that a Conversion will not constitute a taxable exchange of property for purposes of section 1001 because such Conversion is not a significant modification. Therefore, PC holders with built-in gain in their PCs would not incur a tax liability upon a Conversion, and PC holders with built-in losses in their PCs would not recognize a loss upon a Conversion.

Grace Sur

Upcoming FATCA and QI Certifications

We wanted to ensure that our readers were aware of the upcoming certifications that must be made to the IRS for purposes of FATCA and the Qualified Intermediary regime ("QI"). With regards to FATCA, entities with specific FATCA statuses are required to periodically certify to the IRS regarding their FATCA compliance. This certification was originally due by July 1, 2018 for entities with certification periods that ended in 2017. However, the Internal Revenue Service ("IRS") recently delayed the certification due date to no later than December 15, 2018, except for sponsoring entities and trustees of trustee-documented trusts, for which the certification is due no later than March 31, 2019. Related to the certifications, the IRS recently published a FATCA Online Registration user guide, which can assist taxpayers with certain procedural aspects of the certification. Lastly, the IRS advised all FATCA registered entities to update their classifications—even those entities that do not have a certification requirement (e.g., Model I IGA FFIs)—in order to avoid inapplicable certification related notices in the future.

Separately, the QI certifications are also due shortly. For QIs designating 2017 as their periodic review year, the certification due date is March 1, 2019 (postponed from December 31, 2018). All QIs must select the periodic review year of their certification period on the QI portal before September 1, 2018, and this includes those QIs selecting 2017 as their periodic review year. It is worth noting that for QIs which selected either 2015 or 2016 as their periodic review year, certifications were due by September 1, 2018. These certification due dates are also applicable to withholding foreign partnerships and withholding foreign trusts.

Maria Carolina Grecco and Jared Goldberger

Guidance Delaying Gross Proceeds Effective Date Is on the Way

It is not very often that IRS guidance will cause a change in the US disclosure of all debt and equity offerings in the market—just before this issue went to the press, an IRS official speaking at a bar conference shared a bit of news that was too critical for capital markets disclosure for *CMTQ* to pass up including.

Specifically, John Sweeney, branch 8 chief of the IRS Office of Associate Chief Counsel (International), said on October 12 at the Withholding and Information Reporting Conference in New York that the current plan is to include relief for FATCA gross proceeds withholding in a major set of burden reduction regulations.[11] As of this writing, FATCA withholding on gross proceeds from the sale of securities was set to become effective on January 1, 2019.

Brennan Young

In the News

RECENT RECOGNITION

GlobalCapital named Mayer Brown the 2018 Americas Law Firm of the Year – Overall at its Americas Derivatives Awards. In addition, *GlobalCapital* recently named Mayer Brown its 2018 European Law Firm of the Year – Transactions at its Global Derivatives Awards.

International Tax Review named Mayer Brown 2018 New York Tax Firm of the Year and North America Tax Disputes Firm of the Year at its Americas Tax Awards.

Law360 named Mayer Brown Tax Group of the Year for 2018.

RECENT SPEAKING ENGAGEMENTS

US Tax and Financial Services Regulatory Updates: What's New and What's Next – On October 16, 2018 in Toronto, Canada, partners Anna Pinedo and Donald Waack discussed financial services regulatory reform and, partner Thomas Humphreys discussed US tax reform and cross-border impacts.

Commodity Exchange Act Basics – On October 10, 2018, partners Anna Pinedo and Cutis Doty spoke on a Practising Law Institute webinar that provided the basics that a lawyer needs to know to be conversant in and familiar with the Commodity Exchange Act and the regulatory framework for futures, commodity options, swaps, and retail foreign exchange.

Private Business Development Companies – On October 4, 2018, partner Anna Pinedo and counsel Brian Hirshberg spoke on a West LegalEdcenter webinar that provided a brief overview of the legal and regulatory requirements applicable to BDCs generally and an update on recent developments.

PLI's Pocket MBA San Francisco 2018: Finance for Lawyers and Other Professionals – On October 1 and 2, 2018, partner Anna Pinedo led a panel discussion titled "Investment Banking Basics: Fundamentals of Capital Structures".

SPA's Legal, Regulatory & Compliance for Structured Investments Summit 2018 – On September 27, 2018, partner Remmelt Reigersman led a panel discussion titled "Tax Developments Affecting Issuers of Structured Products" and counsel Bradley Berman led a panel discussion titled "LIBOR and Other Benchmark Indices".

2018 Workiva User Conference – On September 19 and 20, 2018, partner Anna Pinedo participated in a panel discussion titled "Adventures in Accounting-Land: The Impact of New Standards on Your SEC Disclosures".

2018 IFR US ECM Roundtable – On September 13, 2018, partner Anna Pinedo participated in the 2018 IFR US ECM Roundtable, which brought together a panel of the most senior ECM practitioners to assess the current state of the market, discuss the latest trends and developments and provide an outlook for the remainder of the year and beyond.

The Euromoney/ECBC Covered Bond Congress 2018 – On September 13, 2018, in Munich, Germany, partner Jerry Marlatt spoke on a panel titled "The Globalization of Covered Bonds: Has the Basel Committee Fired the Starting Gun?"

Intelligize's PIPE Transactions: Basics and Current Developments – On August 15, 2018, partner Anna Pinedo discussed PIPE transactions and current developments during this webinar.

PLI's Getting Your Message Across: Best Practices for Private Companies – On August 2, 2018, partner Anna Pinedo discussed the challenges for privately held companies in communicating effectively with various stakeholders, without violating securities laws, during this webinar.

LexisNexis' Best Practices for Public Companies in 2018 – On August 1, 2018, partners Michael Hermsen and Anna Pinedo addressed some of the topics that should be among the principal areas of focus for disclosure committees, audit committees and others with responsibility for, or oversight of, reporting company disclosures, during this webinar.

West LegalEdCenter's Share Buybacks – On July 24, 2018, partner Anna Pinedo discussed the regulatory framework relating to company share buybacks, including the Rule 10b-18 safe harbor, and the different ways in which companies may choose to structure share repurchases, during this webinar.

PLI's Understanding the Securities Laws 2018 – On July 19 and 20, 2018, partner Anna Pinedo led a session entitled "Securities Act Exemptions" during this conference.

Wolters Kluwer's Regulatory Rollback or Rightsizing? A Review of Regulatory Developments – On July 18, 2018, partners Anna Pinedo and David Sahr reviewed the changes that have come as a result of actions taken by the banking agencies, including proposed amendments to the Volcker Rule and the proposed stress capital buffer. They also addressed the changes contained in the recently enacted Economic Growth, Regulatory Relief, and Consumer Protection Act, during this webinar.

Endnotes

[1] In T.D. 8675 (June 25, 1996) which finalized the section 1.1001-3 debt modification regulations, the IRS said the 1.1001-3 regulations "…do not limit or otherwise affect the application of the 'fundamental change' concept articulated in Rev. Rul. 90-109 (1990-2 C.B. 191) in which the IRS concluded that the exercise by a life insurance policy holder of an option to change the insured under the policy changed "the fundamental substance" of the contract and thus was a disposition under section 1001."

[2] Since the case was submitted without trial, the decision was apparently based on the expert's report.

[3] Under current law, MTM only applies to certain futures and currency contracts under section 1256.

[4] For a detailed discussion of the TCJA and IRS guidance with respect to the same, see the Mayer Brown US Tax Reform Roadmap, available at https://www.mayerbrown.com/experience/us-tax-reform-roadmap/.

[5] New York State Bar Association Tax Section Report on Proposed Mark-to-Market Legislation (February 8, 2018), available at https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2018/1389_Report.html.

[6] Our Legal Update is available at https://www.mayerbrown.com/IRS-Further-Extends-Phase-In-of-Section-871m-Regulations-by-Another-2-Years-09-21-2018/.

[7] For a more detailed discussion of these regulations, see our Legal Update, available at https://www.mayerbrown.com/files/Publication/16fbfe26-6319-4c15-8874-f4a3bb31a304/Presentation/PublicationAttachment/06cc0d4b-8c93-4d28-8a7f-186c17a6e03d/161014-UPDATE-Tax.pdf.

[8] Our Legal Update is available at https://www.mayerbrown.com/Tax-Reform-Income-Acceleration-Provision-Inapplicable-to-Accrued-Market-Discount-10-01-2018/.

[9] Public Law 114-41.

[10] For a more detailed discussion of Revenue Ruling 2018-24 and UMBS, please see our Legal Update, available at https://www.mayerbrown.com/IRS-Rules-Freddie-Mac-MBS-Restructuring-Does-Not-Trigger-Gain-or-Loss-09-04-2018.

[11] Stephanie Cumings," U.S. Burden Reduction Regs, Gross Proceeds Relief Coming Soon," 2018 WTD 200-4 (October 15, 2018).

Contacts

James Barry
Chicago
T: +1 312 701 7169
E: jbarry@mayerbrown.com

Jason Bazar
New York
T: +1 212 506 2323
E: jbazar@mayerbrown.com

Jared Goldberger
New York
T: +1 212 506 2421
E: jgoldberger@mayerbrown.com

Thomas Humphreys
New York
T: +1 212 506 2450
E: thumphreys@mayerbrown.com

Mark Leeds
New York
T: +1 212 506 2499
E: mleeds@mayerbrown.com

Michael Marion
New York
T: +1 212 506 2651
E: mmarion@mayerbrown.com

Russell E. Nance
New York
T: +1 212 506 2534
E: nance@mayerbrown.com

Remmelt Reigersman
Palo Alto
T: +1 650 331 2059
E: rreigersman@mayerbrown.com

Maria Carolina Grecco Bazzanelli
New York
T: +55 11 2504 4636
E: mgrecco@mayerbrown.com

David Goett
New York
T: +1 212 506 2683
E: dgoett@mayerbrown.com

Minju Kim
New York
T: +1 212 506 2169
E: mikim@mayerbrown.com

Grace Sur
New York
T: +1 212 506 2311
E: gsur@mayerbrown.com

Guoyu Tao
New York
T: +1 212 506 2269
E: gtao@mayerbrown.com

Brennan Young
New York
T: +1 212 506 2691
E: byoung@mayerbrown.com