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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

Q2 2019 started out with a great deal of hope in the world of capital markets taxation. We were greatly looking forward to the US Supreme Court granting certiorari in *Estate of McKelvey v. Comm'r* and ultimately helping tax practitioners understand how to apply some fairly complicated Internal Revenue Code (the "Code") sections including sections 1234A and 1259 of the Code. Unfortunately, the quarter ended not with a bang but a whimper, when the Supreme Court denied certiorari in *McKelvey*. Accordingly, we are left with the Second Circuit decision in *McKelvey*, which among other things, finds that an obligation on a variable pre-paid forward contract ("VPFC") is not "property" for purposes of section 1001 of the Code and also that whether the number of shares in a VPFC is "substantially fixed" can be based on a probability analysis (in *McKelvey* the probability that there would be any variation was less than 15%). Unfortunately, McKelvey's estate will end up back in Tax Court to figure out the amount of tax actually owed.

For the rest of the year, we can look forward to a number of projects that are on the Internal Revenue Service's ("IRS") to do list, otherwise known as the business plan.

In This Issue

* As described in the Editor's Note (CMTQ 01/01), this quote is attributed to, among others, Sen. Russell Long (D., LA).

Editor's Note (cont.)

For example, the IRS added the tax issues surrounding LIBOR replacement which is becoming more complicated by the day.

Replacing an existing LIBOR rate in a note or derivative with a replacement when/if LIBOR ceases to be published raises complex issues under section 1001 of the Code as well as other Code sections, and we are steeling ourselves to give special coverage to those LIBOR replacement provisions in the next issue of CMTQ.

This issue of CMTQ also covers the US federal income tax consequences of negative interest, a recently proposed financial transactions tax, a helpful real estate investment trust ("REIT") private letter ruling applying the publicly offered exception to the preferential dividend rule to a subsidiary of publicly offered REIT, and more.

Tax Consequences of Negative Interest Rates

A few years back we thought negative interest rates were just a fad and would soon disappear when the global economy recovered. However, today over $13 trillion of debt worldwide is trading with negative interest rates.[1] The Netherlands, Germany, Switzerland, France and Japan all borrow at negative interest rates through the yield curve.

A few years back we also thought negative interest wouldn't be around long enough for the IRS to issue guidance. We were both wrong and right. Negative interest has persisted and the universe of negative interest debt instruments has expanded, not disappeared. On the other hand, the IRS still hasn't cared enough to issue guidance on the tax treatment of negative interest.

What is negative interest? It is actually quite simple: US investor A ("A") buys a €100 German government bond. The bond has a five-year term. The bond pays A no interest and in five years Germany pays A €99. There is €1 of negative interest.

For federal income tax purposes, there is no authority on how negative interest is treated. There are various possibilities. For example, the negative interest might be seen as a fee of €1 paid by A to have the German government keep its money safe. Or, it might be treated as bond premium. Before the advent of negative interest when Germany paid back €99 and A lost €1 this would be treated as a capital loss to A because retirement of the bond is treated as a sale or exchange under section 1271 of the Code.[2] A could not amortize the €1 premium because Code section 171 provides that bond

1 S. Oh, "Value of Debt with Negative Yields hits $13 trillion," MarketWatch, June 21, 2019.

2 All section references are to the Internal Revenue Code of 1986, as amended.

premium is amortized by offsetting it against qualified stated interest on the bond. Here, there is none.

In 2014, however, the IRS adopted regulations to change this result. Treas. Reg. section 1.171-2(a)(4)(C) provides that the repayment of a debt instrument results in a Code section 171 ordinary deduction for unamortized bond premium in a debt instrument's final accrual period. With a negative interest debt instrument, there will be unamortized bond premium in the final accrual period by definition. So, in our example, at the bond's maturity, A would be entitled to a €1 ordinary deduction.

This is not a case of the IRS being unusually ahead of the curve. Instead, we understand this provision was added to the regulations because a few years back short-term Treasury bills were actually sold by brokers at a negative interest rate and the government wanted to protect people who bought government debt. At the time, we were also told the US Treasury did not have the systems in place to charge debt holders negative interest rates; we have no idea whether that is still the case today.

Another issue is whether payments of negative interest are subject to US withholding tax. For example the €1 in our example, might be treated as a withholdable payment from A in the United States to Germany. In 2015 the Securities Industry and Financial Markets Association ("SIFMA") wrote Treasury on exactly this topic. The IRS has yet to respond, at least in publicly available documents.

As negative interest rates spread throughout the globe, these and other tax issues will gain more scrutiny. If we get negative interest rates in the United States, CMTQ would expect the IRS to take notice and, hopefully, issue guidance. This time it is also likely that the negative interest rate environment will persist long enough so that some of the questions can be answered either by the IRS or by the courts. But, we've been wrong before about negative interest and only time will tell…

McKelvey Denied Cert

On June 17, 2019, the Supreme Court declined to grant certiorari in *Estate of McKelvey v. Comm'r.*[3] The effect of the denial is that the Second Circuit decision in the government's favor will stand.

The taxpayer's petition to the Supreme Court argued that the Second Circuit effectively wrote regulations when it adopted a probability analysis in determining the meaning of "substantially fixed" under section 1259(d) of the Code.[4] The taxpayer referred to this as "phantom regulation," since the

3 For a refresher of the facts of the case and the holding of the Second Circuit, see *Capital Markets Tax Quarterly* Vol. 1, Issue 1, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2018/10/capital-markets-tax-quarterly/files/capital-markets-tax-quarterly-update_oct-2018_v7/fileattachment/capital-markets-tax-quarterly-update_oct-2018_v7.pdf

4 For a summary of the writ of certiorari filing, see *Capital Markets Tax Quarterly* Vol. 2, Issue 1, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/04/capitalmarketsquarterlynewsletter1904.pdf.

circuit court interpreted a Code provision where Congress had directed the US Treasury to issue regulations, but Treasury had not done so.

Although the Supreme Court usually grants a writ of certiorari when there is a split in the circuits, the Supreme Court's denial leaves in place a present split between the circuits on the treatment of "phantom" regulation.[5] Thus, only time will tell whether the Second Circuit decision will have broader significance for how courts treat situations in which they are asked to fill in regulatory gaps or if the decision will only be limited in application to the forward contracts and the Code provisions at issue in the case. At the very least, as we discussed in CMTQ Vol. 1 Issue 1 the questions raised by the Second Circuit's holding in *McKelvey* remain.

Proposed Financial Transactions Tax Favors Market Stability Over Liquidity[6]

On May 22, 2019, Presidential candidate Senator Bernie Sanders (I-VT) proposed the Inclusive Prosperity Act of 2019, which would impose a financial transactions tax (the "FTT") on trades of stocks, bonds and derivatives.[7] The proposal imposes the FTT at different rates (a) 0.5% for stock transactions, (b) 0.1% for note, bond and debenture transactions, and (c) 0.005% for derivatives transactions. When debating the merits of an FTT, some experts assume the most realistic result is a flat rate of 0.1% applied to all transactions.[8] This marks a sharp increase from the current fee rate for securities transactions of approximately 0.002% imposed under the US Securities and Exchange Commission (the "SEC") regulations[9]. Moreover, actual cost to investors may be higher than the proposed rate suggests. As written, the FTT would be assessed against a security's fair market value determined at time of sale.[10]

Sanders' new tax may disincentivize stock trading, and that appears to be the goal. Sanders has singled out high-frequency traders and other "greed[y]" and "reckless" investors as principal targets.[11] According to critics, high-frequency trades destabilize financial markets and raise costs for "legitimate

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5 For a more detailed discussion of the split, see Stephanie Cummings, "Supreme Court Won't Touch Phantom Regs Issue" (June 18, 2019), available at https://www.taxnotes.com/tax-notes-today-federal/financial-instruments/supreme-court-wont-touch-phantom-regs-issue/2019/06/18/29mg7?highlight=mckelvey.

6 CMTQ would like to thank Mayer Brown summer associate, Max Fiest, for his assistance with this article

7 Inclusive Prosperity Act of 2019, S. 1579, 116th Cong. § 1 (2019), available at https://www.congress.gov/bill/116th-congress/senate-bill/1587/text.

8 *See* Klein *infra* fn 7 (discussing a flat rate FTT); Bentsen, Jr. *infra* fn 8 (same).

9 *See* Press Release – Fee Rate Advisory #2 for Fiscal Year 2019, available at www.sec.gov/news/press-release/2019-30?mod=article_inline.

10 The FTT would impose a tax equal to the "specified base amount" for each transaction. Inclusive Prosperity Act at 6. In the case of stock transactions, the tax would equal "the fair market value of the security (determined as of the time of the covered transaction)." *Id.* at 7.

11 *See* Inclusive Prosperity Act of 2019 Summary, available at https://www.sanders.senate.gov/download/inclusive-prosperity-act-of-2019-summary?id=8F81DAA3-84AF-435A-8B90-ECCEA61BC4D3&download=1&inline=file.

traders."[12] Experts agree an FTT could reduce high-frequency trading; whether an FTT would also disincentivize investments based on market or company fundamentals is less certain. According to Kenneth E. Bentsen, Jr., president and CEO of SIFMA, average investors will be harmed.[13] Bentsen stated that investors in 401(k) plans might face further complications, including double taxation. Moreover, an article from the Tax Policy Center suggests, at least in the short run, the tax would be passed along by the banks to investors.[14] This could raise investment costs for vehicles like mutual funds, exchange-traded funds, and 401(k)s. Proponents of an FTT acknowledge the tax may impact larger sections of the economy, beyond high-frequency and Wall Street traders, although by how much is an open question.

While acknowledging these concerns, FTT proponents find principles of equity and stability dispositive. By targeting wealthy, high-frequency traders, the FTT is intended to produce "fairer and possibly less volatile" securities markets.[15] One counter argument is that an FTT has the potential to decrease the quality, liquidity and size of American securities markets, particularly in New York.[16]

Sanders finds "considerable precedent" for his tax in the 40 or so countries which have imposed an FTT. The United Kingdom, Sweden, France and Italy all have imposed an FTT. All but one of these markets were subject to FTT rates above 0.5%. After implementing an FTT, some of these securities markets suffered negative effects, such as an increase in the cost of government pension plans, a decrease in the volume of stock-trade or a decrease in market liquidity.[17]

According to critics, including Bentsen at SIFMA, any reduction in liquidity will "unnecessarily raise costs for *all* investors" and threaten the prized status of America's securities market.[18]

If an FTT is put to a vote, the floor debate will likely revolve around this central policy question: whether the government should favor a liquid and efficient securities market or one which is less volatile and arguably more fair to "the average American family."[19] Tax revenue projections may also be debated, although experts agree the returns may be lower than Sanders anticipates. Sanders

12 *See* Aaron Klein, Congress Wants to Tax Stock Trades; Investors Shouldn't Fret, Brookings (June 10, 2019), available at www.brookings.edu/opinions/congress-wants-to-tax-stock-trades-investors-shouldnt-fret/.

13 *See* Kenneth Bentsen Jr., The Facts Don't Support the FTT, SIFMA.org (June 13, 2019), available at www.sifma.org/resources/news/the-facts-dont-support-the-ftt/.

14 *See* Howard Gleckman, "Can the Sanders Financial Transaction Tax Raise Trillions And Cut Speculation?", available at www.taxpolicycenter.org/taxvox/can-sanders-financial-transactions-tax-raise-trillions-and-cut-speculation.

15 *See* Klein *supra* fn 7.

16 *See* Bentsen, Jr. (citing an analysis by the Joint Committee on Taxation).

17 *See* Bentsen, Jr. (citing an analysis by the Joint Committee on Taxation).

18 *Id*.

19 *See* Inclusive Prosperity Act of 2019 Summary *supra* fn 6.

estimates the tax would raise $2.4 trillion over ten years,[20] while the Tax Policy Center estimated the 2016 version of Sanders' proposal (which was similar) would raise $400 billion over the same period.[21]

Ruling Applies Publicly Offered Exception to Preferential Dividend Rule to Subsidiary of Publicly Offered REIT

Among various changes generally intended to liberalize tax rules governing real estate investment in the United States, the Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act") included a provision adding an exception from the so-called preferential dividend rule (defined below) for publicly offered REITs.[22] On June 14, the IRS released a ruling interpreting the exception broadly.

Generally, REITs are permitted to take deductions for dividends paid.[23] However, preferential distributions do not qualify as dividends for the purposes of computing such deductions (the "Preferential Dividend Rule"). Distributions are considered preferential unless they are made pro rata among all shares of a given class, and with no preference compared with other classes unless it is legally entitled to such preference. The PATH Act added an exception to the Preferential Dividend Rule for publicly offered REITs to the existing exception for publicly offered regulated investment companies. For this purpose, a "publicly offered REIT" was defined as one "required to file annual and periodic reports with the SEC under the Securities Exchange Act of 1934 (the "1934 Act").

In private letter ruling 201924003, the IRS applied the exception for publicly offered REITs to a REIT subsidiary of an exchange-listed REIT. In the ruling, the taxpayer was an indirect subsidiary of the operating partnership of the parent exchange-listed REIT (the "Parent REIT"). The taxpayer REIT had made an election to be treated as a REIT under the Code and had made a pro rata distribution on its common stock. However, at the time of the distribution, the management team did not realize the taxpayer had already issued preferred stock—presumably, accommodation shares. Under the terms of the preferred stock, all accrued but unpaid dividends had to be paid before, or simultaneously with, any other dividends declared or distributed by the taxpayer, so the distribution on its common stock would otherwise have been preferential. The taxpayer represented that it is consolidated with the Parent REIT under generally accepted accounting principles for purposes of the reports that the Parent REIT is required to file with the SEC under the 1934 Act, including its consolidated financial statements. Since the taxpayer's assets, income, loss and other activities are reported to the SEC as part of the Parent REIT's consolidated reports, the IRS concluded that the taxpayer meets the

20 *See supra* fn. 8.

21 *See* https://www.taxpolicycenter.org/taxvox/can-sanders-financial-transactions-tax-raise-trillions-and-cut-speculation. For reference, Sanders estimated his 2016 FTT proposal would raise $3 billion in ten years.

22 *See* Mayer Brown Legal Update on the PATH Act, available at https://www.mayerbrown.com/files/Publication/7d1d7818-82df-4d54-93b3-e3e8c4a3b505/Presentation/PublicationAttachment/fbfb23da-7a2e-429f-abe1-f1e41021c435/151221-UPDATE-Tax-RE.pdf

23 Sec. 857(b)(2)(B) of the Code.

requirements to itself qualify as a publicly offered REIT and held that the distribution on its common stock was not subject to the Preferential Dividend Rule.

Proposed Regulations on Distribution of Property Withdrawn

Section 301 of the Code contains rules for the treatment of a distribution of property made by a corporation to its shareholders with respect to such shareholder's stock ownership in that corporation. The proposed regulations were issued in 2009 under section 301 (the "Proposed Regulations")[24] providing guidance for shareholders and security holders of corporations regarding (1) the recovery of stock basis in distributions under section 301 and transactions treated as dividends to which section 301 applies, and (2) the determination of gain and the basis of stock or securities received in exchange for, or with respect to, stock or securities in certain transactions. On March 28, 2019, the IRS withdrew the Proposed Regulations.[25]

The Treasury and IRS argued that the Proposed Regulations provided a single model for stock basis recovery by a shareholder that receives a distribution to which section 301 applies and a single model for sale and exchange transactions to which section 302(a) applies, including certain elements of an exchange pursuant to a plan of reorganization under section 368. The proposed regulations would have also defined the scope of the exchange that must be analyzed under particular Code provisions and provided a methodology for determining gain under section 356 and stock basis under section 358.

The Treasury and IRS received comments on the Proposed Regulations and concluded that it is unlikely that the approach of the Proposed Regulations can be implemented in final regulations without significant modifications and, therefore, withdrew them. The Treasury and IRS, however, "continue to believe that under current law, the results of a section 301 distribution should derive from the consideration received by a shareholder in respect of each share of stock, notwithstanding designations otherwise...[and] also continue to believe that, under current law, with respect to redemptions governed by section 302(d), any unrecovered basis in the redeemed stock of a shareholder may be shifted to other stock only if such an adjustment is a proper adjustment within the meaning of §1.302-2(c). Not all shifts of a redeemed shareholder's unrecovered basis result in proper adjustments, and certain basis adjustments can lead to inappropriate results."

Based on the Proposed Regulations, language was included in tax disclosures for preferred stock of companies that also had common stock outstanding to the effect that if the Proposed Regulations were adopted, such regulations could affect the basis recovery rules applicable to stockholders. In light of the withdrawal of the Proposed Regulations, such provisions may no longer need to be

24 The Proposed Regulations are available at https://www.federalregister.gov/documents/2009/01/21/E9-1100/the-allocation-of-consideration-and-allocation-and-recovery-of-basis-in-transactions-involving.

25 The withdrawal is available at https://www.govinfo.gov/content/pkg/FR-2019-03-28/pdf/2019-05959.pdf.

included. Instead, tax disclosures in this situation can possibly include vaguer language that, for distributions on preferred stock that reduce basis because such dividends exceed earnings and profits, the method by which a holder of such preferred stock must reduce its basis is uncertain in situations where the holder owns different blocks of stock that were acquired at different prices and thus have different bases.

Notice 2019-39 – Guidance for Current Refunding of Targeted Tax-Exempt Bonds

On May 22, 2019, the IRS issued Notice 2019-39 (the "Notice") permitting current refunding of tax-exempt bonds that were issued in targeted bond programs. This guidance was intended to eliminate the need for separate program-specific guidance allowing current refunding for bond programs like the "GO Zone Bonds" issued in response to Hurricane Katrina and Tribal Economic Development Bonds issued by Indian tribal governments to finance eligible projects on Indian reservations. Congress has often used these targeted bond programs to help state and local governments raise money to provide disaster relief or promote economic development in targeted circumstances.

Such targeted bond programs generally either must be issued by a certain date or are subject to a bond volume cap, and there has historically been ambiguity about whether new bonds can be used to refund such bond issuances. The Notice states that such refundings are favored from a policy perspective, noting that permitting current refunding can reduce borrowing costs and also reduce the federal costs of the associated tax benefit of such bonds.

The Notice states that a bond issue used to refund original targeted tax-exempt bonds will qualify as tax-exempt as well, without regard for any bond volume cap or issuance time deadline, if the following requirements are met:

(1) The original targeted bonds must have satisfied the applicable bond volume cap or issuance time deadline requirements;

(2) The issue price of the new bonds may be no greater than the outstanding principal of the original bonds (or if the original bonds were issued with more than *de minimis* original issue discount or bond premium, no greater than the present value of the original bonds); and

(3) The new bonds must meet all of the other applicable requirements besides the bond volume cap and issuance time deadline, such as the requirement for private activity bonds that their average bond maturity be no greater than 120 percent of the average reasonably expected economic life of the facilities financed or refinanced.

The Notice applies to current refunding issues that are issued on or after May 22, 2019, and may be applied to current refunding issues that were issued before May 22, 2019.

IRS Issues Proposed Regulations Regarding Withholding Under Section 1446(f)

On May 7, 2019, the US Treasury Department and the IRS released proposed regulations under section 1446(f) regarding withholding obligations related to certain transfers of interests in partnerships engaged in a US trade or business. One takeaway for the day-to-day is that in order for a US transferor to be exempt from such withholding, it may generally provide an IRS Form W-9 (subject to certain exceptions for more complicated structures, such as publicly traded partnerships). For a summary of these proposed regulations, see our Legal Update.[26]

26 Our Legal Update is available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/06/proposed-1446f-regulations.pdf.

In the News

RECENT RECOGNITION

GlobalCapital has named Mayer Brown Americas Law Firm of the Year – Overall for the second consecutive year at their 2019 Americas Derivatives Awards. In addition, *GlobalCapital* named Mayer Brown their 2018 European Law Firm of the Year – Transactions at their Global Derivatives Awards.

Mayer Brown was ranked in Tier 1 by *Legal 500* in all categories for Tax, including Tax: Financial Products, Tax: Non-Contentious, International Tax and Tax: Contentious in 2019.

International Tax Review named Mayer Brown 2018 New York Tax Firm of the Year and North America Tax Disputes Firm of the Year at their Americas Tax Awards. *Law360* named Mayer Brown Tax Group of the Year in 2018.

UPCOMING EVENTS

Draft Guidance on Financial Transactions Webinar

On September 4, 2019, Mayer Brown will host the fourth webinar in its Transfer Pricing Webinar Series.

This webinar will review the Public Discussion Draft on Financial Transactions (BEPS Actions 8-0) published in July 2018. We will focus on the guidance on accurate delineation of financial transactions, and compare and contrast this guidance with domestic rules on capital structure in the United States and select European countries. We will also discuss arm's length pricing of specific issues, including loans, treasury function, hedging, guarantees and captives.

Senior Energy Tax Executive Roundtable: Thriving in Continued Volatility

Mayer Brown is co-hosting the Senior Energy Tax Executive Roundtable on October 7, 2019 in Houston.

Senior Energy Tax Executive Roundtable: Thriving in Continued Volatility. During this one-day program, Mayer Brown, PwC and senior tax executives from prominent energy companies will come together to discuss the most pressing tax issues facing the energy industry today.

RECENT SPEAKING ENGAGEMENTS

Debt Capital Markets – Regulatory Developments & Market Outlook – On April 2, Thomas Humphreys and Anna Pinedo provided a recap of debt capital markets activity in 2018, discussing some of the regulatory developments that are, and will continue to, impact issuances by financial institutions, including the Canadian Banks. In particular, they discussed issuance experience with Canadian bail-in, issues arising in connection with 3(a)(2), and certificate of deposit programs. Topics included: A recap of debt capital market activity; issuance levels and trends; experienced to date with bail-in debt issuances; NVCC and other issuances; addressing TLAC; tax developments; and what to expect in the months ahead.

mtn-i's 13th Americas Structure Note Showcase & Awards – On April 4, Bradley Berman spoke on the legal issues around electronic trading platforms during the "Pitch Stars" portion of the 13th annual mtn-i Americas Structured Note Showcase & Awards' annual awards showcase, which celebrates structured products deals, investor solutions and institutional performances of the year.

The 12th Annual Global Covered Bonds Conference – On April 4, Anna Pinedo and Jerry Marlatt presented panels at the 12th edition of our Global Covered Bonds Conference, which heralded the first substantial gathering of the covered bonds industry of the year, and brought issuers from around the globe, as well as European investors looking to diversify their portfolios, to the convenience of one London venue.

With record setting deals issued to start 2019, the Global Covered Bonds conference entered a year of opportunity and transition, given the ECB funding withdrawal and harmonisation directive, as well as a covered bonds market in a post-Brexit era. Anna's panel was entitled "The Green Mile: Market Outlook for the Green Covered Bond Market." The panel discussed: do the Green Bonds Principles provide a straight and clear model for the future; incentives for applying a green covered bond market and advantages to the borrower; investor appetite; and legal and structural implications.

REVERSEinquiries Workshop Series: Structured UITs and Repack Structures – On April 8, Anna Pinedo, Bradley Berman, Jerry Marlatt and David Goett presented a workshop on offering exposure to structured product-like returns in different wrappers or through repacking vehicles, which raise a number of considerations. Items discussed included UIT basics and structured UITs, Investment Company Act and tax issues arising in connection with UITs, alternative repack structures, Volcker Act, Investment Company Act and commodity pool issues arising in connection with repack structures, and tax structuring considerations with repack structures.

PLI's Global Capital Markets & the U.S. Securities Laws 2019 – On April 12, Phyllis Korff presented on a panel during PLI's Global Capital Markets & the U.S. Securities Laws 2019, which provided an update of domestic and international regulatory and market developments, bringing together an engaging group of expert practitioners and senior regulators for an in-depth look at how the U.S. securities laws work in the context of a rapidly evolving global regulatory environment. Phyllis' panel was entitled "Global Capital Markets Perspectives in 2019," and included the following topics: the state of capital markets in a global environment; the SEC's international regulatory agenda; regulatory coordination and cooperation around the world; areas of focus for issuers raising capital in global markets; and current trends in foreign offerings in the United States.

PLI's Disclosure Effectiveness and FAST Act Amendments – On April 12, David Bakst and Anna Pinedo led a discussion on the Securities and Exchange Commission adopting additional amendments that simplify disclosure requirements. These amendments, which become effective in the spring, are responsive to the rulemaking mandate in the Fixing America's Surface Transportation (FAST) Act. Topics included: the SEC's disclosure effectiveness initiative; the changes brought about by the 2018 disclosure amendments adopted in part as a result of the FAST Act; the latest FAST Act Amendments, including: detailed overview of the changes to existing requirements, drafting MD&A in light of new flexibility and considerations relating to presentation of prior periods, risk factors and materiality concepts and deciding whether to omit confidential information from exhibits; and the rulemaking proposals and concept release that are still pending and what to expect.

Share Buybacks and 10b-18 – On April 16, Anna Pinedo and Laura Richman led a discussion on 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, including the advantages and disadvantages associated with each. Topics included: basics of Rule 10b-18; required authorizations, disclosures, and documentation; accelerated share repurchases and other modified repurchase plans; and legislative proposals relating to 10b-18 and other recent developments.

REVERSEinquiries Workshop Series: Certificate of Deposit Programs and Brokered CD Programs – On April 29, Anna Pinedo, Bradley Berman and Remmelt Reigersman provided an overview of the documentation and other requirements to establish a certificate of deposit program or brokered certificate of deposit program. They reviewed the bank regulatory, distribution related, FINRA related, and suitability related considerations, and discussed: setting up a CD program; disclosure and documentation considerations; settlement issues; the bank regulatory differences between CD and brokered CD issuances; the FDIC advance notice of proposed rulemaking on brokered CDs; and FINRA and securities law considerations.

Preparing Boards for CEO Social Media Do's & Dont's – On May 1, Anna Pinedo joined Martyn Chapman (Nasdaq Governance Solutions), Courtney Kamlet (Syneos Health), and Ben Maiden (Corporate Secretary) to lead a discussion on the importance of boards understanding the potential risks of CEO social media use, how to prevent problems and how to respond if a crisis arises, and that governance teams are key to educating and preparing directors and to ensuring the right policies and processes are in place. Topics discussed include: what is the board's role in the oversight of – and liability for – a CEO's individual use of social media; now should the board get involved in issues regarding the use of social media by an executive or the company; what should the board's involvement be in crisis management as it relates to social media; and how can governance teams help boards prepare for a social media-related crisis, and help the board through the process once an event has occurred?

NEXUS:ISRAEL – On May 6, Anna Pinedo and Phyllis Korff presented at NEXUS:ISRAEL, an interactive conference uniting the leading finance, investment and business professionals with the most prolific innovators from the spheres of nanotechnology, computer, health, agriculture, environmental and life sciences, to build capacity for the next generation of technology investment, commercialization and knowledge exchange. This one-day event showcased powerful stories at the intersection of invention, innovation and commercialization of new technologies designed to create greater social and economic value around the world.

Mortgage REIT Summit 2019 – On May 9, Anna Pinedo, Jon Van Gorp, Andrew Noreuil, Brian Hirshberg, Jennifer Carlson, Lauren Pryor, Jeffrey Cantrell, Thomas Humphreys, Mark Leeds, Michael Hermsen, Phyllis Korff, Paul Jorissen, Laurence Platt, Haukur Gudmundsson, Susannah Schmid, Lawrence Hamilton and Elizabeth Raymond all presented at our inaugural Mortgage REIT Summit 2019. During this conference, they discussed: the state of the market for mREITs and trends affecting mREITs; external managers, activists, and shareholder engagement; consolidation and acquisition activity in the sector (is bigger better? adding servicing or origination? other trends); 40 Act and tax developments; Opportunity Zone Funds & mREITs; SEC areas of focus for mREITs; GSE updates and mortgage policy reform; non-dilutive financing strategies; asset-specific financing developments; and prospects for return of captive insurance companies.

A Fireside Chat About Futures – An Interview of Leo Melamed by Matt Kluchenek – On May 23, Matthew Kluchenek, in conjunction with the Chicago Bar Association's Futures & Derivatives Law Committee, Financial and Emerging Technology Committee and Regulatory & Compliance Committee, led a fireside chat with Leo Melamed, Chairman Emeritus of the CME Group.

PLI's Private Placements and Hybrid Securities Offerings 2019 – On May 23-25, Anna Pinedo and Michael Hermsen took part in the Practising Law Institute's Private Placements and Hybrid Securities Offerings 2019 conference, which brought together an expert faculty of leading practitioners and regulators to discuss and analyze the changing regulatory framework and market for private offerings. The conference began by addressing the basics of private placements, resales of restricted securities, Rule 144 and Section 4(a)(1-½) transactions and block trades. Speakers addressed the changes to private and exempt offerings brought about by the JOBS Act, including matchmaking platforms, "accredited investor" crowdfunding, offerings using general solicitation, Rule 144A offerings, and the practical implications of these changes for issuers, broker-dealers and investment advisers. The panelists discussed the considerations that have led many companies to remain private longer and defer IPOs, while creating liquidity opportunities for holders through private secondary trading markets. Panelists also addressed the basics of structuring and conducting traditional private placements, late-stage or mezzanine private placements, PIPE transactions, Rule 144A transactions, and institutional debt private placements. Anna served as the Chairperson of this year's Private Placements and Hybrid Securities Offerings conference, and Michael spoke on the Regulation A Offerings panel on day one of the conference.

PLI's Commodity Pool and CPO Regulation – Staying within the Exemptions and Exclusions – On June 4, Anna Pinedo and Matthew Kluchenek led a discussion on recent changes to the definition of commodity pool, and the fact that many more passive investment vehicles, including trusts and funds, must focus on possible characterization as commodity pools. Topics included: the commodity pool definition and related CTA definition; the types of structures that may raise particular concerns, including funds, trust, securitization and repackaging vehicles; the scope of relief and exemptions; the regulation of commodity pools; disclosure, conduct, advertising and related matters; and proposed relaxation of certain CPO related rules.

ACA Compliance Group Webinar - Qualified Opportunity Zone Funds – On June 6, JoonBeom Pae and Matthew McDonald participated in a discussion regarding Qualified Opportunity Zone Funds to understand their benefits, how they differ from traditional real estate funds, and any relevant compliance issues involved with managing these vehicle

Life Sciences Reverse Mergers and Alternative IPOs – On June 11, Anna Pinedo and Brian Hirshberg, joined by Evan Bernstein of MTS Health Partners, L.P., led a discussion on the legal considerations of merging into a public life sciences company that has cash on hand and a failed clinical program. Topics included: how this differs from a reverse merger into a shell; structuring alternatives; documentation, process and timeline; addressing board and employee matters; anticipating litigation; and concurrent or subsequent financing opportunities.

Regulation A: Basics, Amendments & Offering Methodologies – On June 12, Anna Pinedo and Michael Hermsen presented a webinar that provided the opportunity to learn how the US Securities and Exchange Commission amended Regulation A in order to allow companies subject to the reporting requirements of the Exchange Act to make offerings in reliance on the Regulation A exemption. Attendees learned to understand the components of a Regulation A offering, be able to counsel clients on the benefits of a Regulation A offering and understand the possible offering methodologies available.

Covered Bond Investor Conference 2019 – On June 27, Jerry Marlatt and Anna Pinedo presented at the Covered Bond Investor Conference, hosted by the ICMA Covered Bond Investor Council and the Covered Bond Report in Frankfurt. Topics included: regulation in Covered Bond Directive and ESN developments; green, sustainable & social bonds; developing covered bond structures; and investor sentiment in the post CBPP3 era.

A "How to Guide" to Basic Derivatives, Swaps Clearing & Structured Products – On June 28, Anna Pinedo helped lead a New York City Bar Association course to enable both in-house and outside counsel to expand their skills and be more valuable to their clients by covering the why, what, when, where and how of derivatives. Derivatives are used by most large public and many private companies, in part to manage risk. This basic course covered how the International Swaps Dealer Agreements ("ISDA") and Credit Support Agreements ("CSAs") work; how to avoid common, costly mistakes and unintended consequences when negotiating ISDA contracts; and understanding the differences among the three contract types. Changes in margin rules and SEC and CFTC regulations were highlighted. LegalTech and FinTech opportunities and trends related to derivatives, including blockchain, distributed ledgers, smart contracts and best practices in documentation projects, were also covered, including ISDA-Create IM, the online process to agree and produce initial margin documentation and create valuable structured legal data. One hour of ethics credit related to compliance with new derivatives and structured products regulations was available. Anna's panel was entitled "Key Considerations in Derivatives, Structured Products and Collateral", and discussed: regulatory margin requirements; collateral posting and protection issues; bankruptcy and credit downgrade considerations; understanding netting of exposures, risk exposure, valuation and risk: notional values, counterparty risk, pricing and leverage; use of derivatives in M&A; and the tax implications of various derivatives and structured notes.

Tax Incentive Negotiation: The Qualified Opportunity Zone and More - On July 10, JoonBeom Pae and Leah Robinson led a discussion on Qualified Opportunity Zones and State and Local Tax Issues for members of the Korean American Executive Forum.

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