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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

It is hard to believe that only two short years ago we were just digging out from enactment of the Tax Cuts and Jobs Act. Since then, the Internal Revenue Service ("IRS") has issued more than 60 proposed and final regulations on any number of TCJA topics, including the base erosion anti-abuse tax ("BEAT"), the global intangible low taxed income ("GILTI") provisions, and the Code Section 965 deemed repatriation rule.[1] From CMTQ's perspective, that guidance tsunami has mostly kept the IRS out of the financial products rule making business except where TCJA is involved or regulations are affirmatively being withdrawn as we describe below with regard to Section 385. Last fall, however, we welcomed the first significant financial products guidance in a while—proposed regulations dealing with replacement of the London Interbank Offered Rate—which we covered extensively last quarter. When one looks at the IRS business plan there are other financial instrument tax topics the IRS is working on but some significant projects, such as final regulations on contingent notional principal contracts or final regulations on credit default swaps, are nowhere to be found.

In This Issue

1 The list of tax reform guidance is available at https://www.irs.gov/newsroom/tax-reform-guidance.

* 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.)

Apart from TCJA, another factor that has kept the IRS relatively quiet in our space is "mark to market" ("MTM") taxation for certain financial instruments (or lack thereof). Way back in 2014, Representative Dave Camp proposed a MTM system for derivatives. That provision did not make its way into the TCJA. (When you can raise nearly $700 billion over the budget horizon by eliminating, among other deductions, the deduction for state and local taxes, the revenue MTM would have raised probably seemed like a big headache for a small amount). While there are updated MTM proposals, including an expanded one from Senate Finance Committee Ranking Member Senator Ron Wyden (D., Oregon) (see CMTQ Vol. 2 Issue 3), MTM's future is uncertain. However, for many years the IRS seems to have put on hold guidance on any significant financial products tax issues in the expectation that mark to market taxation would become law.

As we enter the 2020 election backstretch, it's up to CMTQ, however, to ask whether we aren't well beyond MTM aimed at only at financial products? For example, this quarter's CMTQ describes Sen. Elizabeth Warren's wealth tax proposal—a completely different approach to raising tax revenue. The wealth tax would mark to market every asset of certain wealthy taxpayers ($50 million or more of assets) and impose an annual tax (ranging from 2-6%) based on the MTM value. This "super MTM" system might well obviate the need for MTM on derivatives owned by lesser mortals. In other words, because it will raise so much money, taxpayers below the $50 million threshold will have the pleasure of dealing with existing US tax law on financial products for quite some time—maybe forever.

With the primary season about to begin, the way forward (capital markets taxwise) may become more clear. Of course, thinking back to January 2016, no one could have predicted that large parts of Donald Trump's tax reform on one web page would become law in a few short years or that, even after US tax reform, we still would not have a comprehensive system for taxing financial instruments.

In this issue of CMTQ, we cover the new extension to the phase-in of the application of the section 871(m) regulations, the current status of the section 385 debt-equity regulations, presidential candidate Elizabeth Warren's aforementioned wealth tax proposal, and more.

Section 871(m) Phase-In Extended through 2022

On December 16, 2019, the IRS released Notice 2020-2 (the "Notice"),[2] which further extends the phase-in of regulations under Section 871(m) of the Code[3] (the "Regulations")[4] and related provisions. Section 871(m) and its regulations generally treat "dividend equivalents" paid (or deemed paid) under certain contracts as U.S. source dividends that are subject to withholding tax if paid to a non-U.S. person.

Prior to the release of the Notice, the IRS had issued the following guidance on the Regulations:

- Notice 2010-46 containing the qualified securities lender (the "QSL") regime, published in June 2010;
- Notice 2016-76 delaying the effective date of the Regulations, among other things, published in December 2016, and its corresponding final and temporary regulations published in January 2017;[5]
- Revenue Procedure 2017-15 containing the final Qualified Intermediary Agreement (the "2017 QI Agreement"), published in January 2017;
- IRS Notice 2017-42 providing a similar phase-in of the Regulations and related provisions , published in August 2017; and
- IRS Notice 2018-72 also providing a similar phase-in of the Regulations and related provisions, published in October 2018.[6]

The Notice is a near mirror image of Notice 2018-72, again providing for extensions to four areas related to section 871(m): (1) the phase-in for non-delta-one transactions, (2) the simplified standard for determining whether transactions are "combined transactions" within the meaning of the Regulations, (3) relief for qualified derivative dealer ("QDD") reporting,[7] and (4) the transition out of the qualified securities lender (the "QSL") regime. Each of these extensions is discussed in more detail below.

2 Notice 2020-2 is available at https://www.irs.gov/pub/irs-drop/n-20-02.pdf.

3 All section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and the Treasury regulations promulgated thereunder.

4 For a more detailed discussion of the 2015 final regulations, see "IRS Releases Final & Temporary HIRE Act Regulations Addressing Section 871(m) Dividend Equivalents."

5 For a more detailed discussion of Notice 2016-76, see "Stress Relief: IRS Notice 2016-76 Eases the Implementation Rules for Cross-Border Dividend Equivalent Withholding."

6 For a more detailed discussion of Notice 2018-72, see "IRS Further Extends Phase-In of Section 871(m) Regulations by Another 2 Years."

7 For a more detailed discussion of the QDD rules, see "I Have Always Been Afraid of Banks: the IRS Revamps Cross-Border Dividend Equivalent Rules on President Obama's Last Day in Office."

Extension of Phase-in for Delta-One and Non-Delta-One Transactions

Under previous IRS guidance, the Regulations would not apply to potential section 871(m) transactions[8] that were not delta-one that were entered into before January 1, 2021. The Notice extends this relief for non-delta-one transactions to cover transactions entered into before January 1, 2023.[9] This additional two-year extension is welcomed by the structured products market, since a majority of structured products are non-delta-one transactions.

The Regulations still apply to any potential section 871(m) transaction that has a delta of one entered into on or after January 1, 2017.

Previous IRS guidance provided that 2017-2020 would be phase-in years for delta-one transactions, meaning that the IRS would take into account a taxpayer or withholding agent's good faith effort[10] to comply with the Regulations when enforcing the same. Prior guidance also provided that through 2020 non-delta-one transactions would be reviewed on this good faith standard. The Notice extends this more lenient enforcement standard through 2022 for delta-one transactions and provides that examinations of non-delta-one transactions will use the good faith standard through 2022.

Additionally, previous IRS guidance provided that the IRS would take into account the extent to which a qualified derivatives dealer (a "QDD") made a good faith effort to comply with the Regulations and the relevant provisions of the 2017 QI Agreement through 2020. The Notice extends this similar good faith enforcement standard through 2022.

Extension of the Simplified Standard for Determining Whether Transactions Are Combined Transactions

IRS guidance provides for a simplified standard for withholding agents to apply in determining whether two or more transactions should be combined in order to determine whether the transactions are subject to section 871(m), namely that a broker may presume that transactions should not be combined for section 871(m) purposes unless they are over-the-counter transactions that are priced, marketed, or sold in connection with each other. Under the general rule in the Regulations, a short party could have presumed that transactions that together generate the required dividend equivalent payments are not entered into in connection with each other if either (i) the long party holds the transaction in separate accounts and the short party does not have actual knowledge that the accounts were created separately to avoid section 871(m), or (ii) the transactions were entered into two or more business days apart. IRS guidance provided a simplified standard for 2017-2020, the Notice extends application of the simplified standard through 2022.

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8 See Treas. Reg. section 1.871-15(a)(12). A "potential Section 871(m) transaction" is any securities-lending or sale-repurchase transaction, NPC, or ELI that references one or more underlying securities.

9 The Notice and thus the grandfather for non-delta-one instruments does not apply to a "specified NPC," as described in Treas. Reg. section 1.871-15(d)(1).

10 Relevant considerations for the determination of good faith include whether a taxpayer or withholding agent made a good faith effort to: (i) build or update its documentation and withholding systems to comply with the Section 871(m) regulations, (ii) determine whether transactions are combined, (iii) report information required under the Section 871(m) regulations, and (iv) implement the substantial equivalence test. *See* Notice 2016-76.

Extension of Phase-ins for QDDs

The Notice extends the same three QDD phase-ins that were delayed until 2021 by prior IRS guidance. Previous IRS guidance provided that a QDD:

- will not be subject to tax on dividends and dividend equivalents received in the QDD's equity derivatives dealer capacity until 2021;
- will be required to compute its section 871(m) tax liability using a net delta approach beginning January 1, 2021; and
- pursuant to the 2017 QI Agreement, must perform certain periodic reviews with respect to its QDD activities, but only beginning in 2021.

The Notice pushes each of these dates back to begin in 2023.

Extension of QSL Transition Rules

Notice 2010-46 contained an early IRS solution to potential overwithholding on a chain of dividends and dividend equivalents (i.e., where an intermediary is withheld upon and subsequently withholds on the same payment stream). The QSL regime provides for (1) an exception to withholding for payments to a QSL, and (2) a framework to credit forward prior withholding on a chain of dividends and dividend equivalents. The QDD rules were meant to replace the QSL regime, however, IRS guidance provided that withholding agents may use the QSL rules for payments made in 2018 through 2020. The Notice provides that withholding agents can use the QSL rules for payments made in 2021 and 2022 as well.

Looking Forward

What will ultimately become of section 871(m) and its regulations? The tax community has wondered whether non-delta-one transactions might one day become exempt from the Regulations completely. However, with extensions to 2023, any permanent limit for section 871(m) and its regulations may go back on the back burner for the immediate future. The Notice states that taxpayers are permitted to rely on it until the Regulations and the 2017 QI Agreement are amended to reflect the extensions contained in the Notice.

Select Section 871(m) Regulations Finalized

In conjunction with Notice 2020-2, the IRS published final regulations under Treas. Reg. section 1.871-15 (the "Final Regulations") that finalized the 2017 proposed regulations under section 871(m) of the Code (the "Proposed Regulations") without substantive changes and withdrew the corresponding temporary regulations.[11]

The final regulations under §1.871-15 (the "Final Regulations") adopted the definition of the term broker in the Proposed Regulations unchanged. The Proposed Regulations cross-reference Section 6045(c) in defining the term broker but, in response to comments, exclude from the Section 6045(c) definition any corporation that is a broker solely because it regularly redeems its own shares.

In addition, the Final Regulations provide guidance on when the delta of an option that is listed on a foreign regulated exchange may be calculated based on the delta of that option at the close of business on the business day before the date of issuance. The IRS did not adopt a comment suggesting that the $10 billion threshold should be removed from the definition of a regulated exchange, but it clarified that the threshold is determined based on the notional amount of the options. The Final Regulations state that the Treasury and the IRS will continue to study this comment in connection with future guidance and welcome taxpayer comments on alternative thresholds.

The Final Regulations further provide guidance on identifying which party to a potential section 871(m) transaction is responsible for determining whether a transaction is a section 871(m) transaction when multiple brokers or dealers are involved in the transaction. The guidance in the Final Regulations is identical to that in the Proposed Regulations on this point.

Backup Withholding Notices to Payers Redesigned to Provide More Information

On November 14, the IRS announced redesigned CP2100 and CP2100A notices to provide more information to taxpayers.[12]

CP2100 and CP2100A notices are issued to taxpayers by the IRS to inform the recipient that there may be issues with a previously filed IRS Form 1099 information return by the taxpayer. Such issues could result in payers being responsible for backup withholding. This is often the case when taxpayer identification numbers ("TINs") are missing from IRS records or filed returns have incorrect name/TIN combinations. The consequence of such backup withholding is that taxpayers may have to withhold at the 24% backup withholding rate.[13]

11 The Final Regulations are available at https://www.govinfo.gov/content/pkg/FR-2019-12-17/pdf/2019-26977.pdf.

12 See "Redesigned Backup Withholding CP2100 and CP2100A Notices," Internal Revenue Service, available at https://www.irs.gov/newsroom/redesigned-backup-withholding-cp2100-and-cp2100a-notices/.

13 See "Reduced 24-percent withholding rate applies to small businesses and other payers," Internal Revenue Service, available at https://www.irs.gov/newsroom/reduced-24-percent-withholding-rate-applies-to-small-businesses-and-other-payers-revised-backup-withholding-publication-features-helpful-faqs.

The notices provide more information to payers that file certain information returns about types of TINs issued, how to validate TINs, when to stop backup withholding, which notice the taxpayer must send to an affected payee, and what to do after receiving a notice. The announcement states that the updated notices will list the specific payees identified as having TIN issues and encourages payers to consult Publication 1281 for further information.[14]

Update on Section 385 Regulations: Changes to Certain Documentation Requirements and the Per-se Funding Rules

Background – Section 385 Regulations

On October 21, 2016, the Department of the Treasury and the IRS published final and temporary regulations[15] under section 385 (the "Section 385 Regulations") that addressed the classification of certain related-party debt as debt or equity for federal income tax purposes. The Section 385 Regulations included rules which established minimum documentation requirements that had to be satisfied in order for purported debt obligations among related parties to be treated as debt for federal income tax purposes (the "Documentation Regulations")[16] as well as rules that treated as stock certain debt issued by a corporation to a controlling shareholder in a distribution or in another specified related-party transaction with an economically similar result (the "Distribution Regulations").[17]

On April 21, 2017, Executive Order 13789 (the "Executive Order") instructed the Secretary of the Treasury to review all significant tax regulations issued on or after January 1, 2016, and to take concrete action to alleviate the burdens of regulations that (i) imposed an undue financial burden on U.S. taxpayers; (ii) added undue complexity to the Federal tax laws; or (iii) exceeded the statutory authority of the IRS. Notice 2017–38[18] issued in July, 2017, included the Section 385 Regulations in a list of eight regulations identified by the Secretary as meeting at least one of the first two criteria specified in the Executive Order.

Pursuant to the Executive Order, on September 24, 2018, the Treasury Department and the IRS issued a notice of proposed rulemaking[19] (the "Proposed Regulations") that removed the Documentation Regulations from the Section 385 Regulations. The preamble to the Proposed Regulations provided

14 For Publication 1281, see https://www.irs.gov/pub/irs-pdf/p1281.pdf.

15 T.D. 9790

16 See § 1.385–2

17 See Treas. Reg. §§ 1.385–3, 1.385–3T, and 1.385–4T.

18 2017–30 I.R.B. 147 (July 24, 2017).

19 REG-130244-17.

that taxpayers may rely on these proposed regulations, in their entirety, until the date a Treasury decision adopting these regulations as final regulations is published in the Federal Register.

Treasury Decision T.D. 9880 and the Removal of the Documentation Regulations

After considering the comments received regarding the Proposed Regulations, on October 31, 2019, the Treasury Department and the IRS released for publication Treasury Decision 9880 whereby the Treasury Department and the IRS adopted the Proposed Regulations as final regulations with no change, effectively removing the Documentation Regulations from the Section 385 Regulations. In making their determination, the Treasury Department and the IRS concluded that the burdens imposed on taxpayers by the Documentation Regulations outweighed the regulations' intended benefits.

It is important to note that the IRS continues to consider the issues raised by the Documentation Rules, and may propose a modified version of the Documentation Regulations with a prospective effective date. The Treasury Department and the IRS have requested comments regarding approaches that would minimize taxpayer burdens, while ensuring the collection of sufficient documentation and other information necessary for tax administration purposes.
The removal of the Documentation Regulations and the conforming modifications are effective as of November 4, 2019.

Advance Notice of Proposed Rulemaking (REG-123112-19) and the Modification of the Distribution Regulations

In addition to issuing T.D. 9880, the Treasury Department and the IRS announced their intent to propose more streamlined and targeted Distribution Regulations which would substantially modify and eliminate certain provisions from these rules. *See* advance notice of proposed rulemaking (REG-123112-19) (the "Section 385 ANPRM").

Under the Distribution Regulations, the issuance of a debt instrument by a member of an expanded group to another member of the same expanded group in a distribution, or an economically similar transaction, may result in the treatment of the debt instrument as stock.[20] The Distribution Regulations include a *funding rule* that treats as stock a debt instrument that is issued as part of a series of transactions that achieves a result similar to a distribution of a debt instrument.[21] Specifically, the regulations treat as stock a debt instrument that was issued in exchange for property, including cash, to fund a distribution to an expanded group member or another transaction that achieves an economically similar result. Furthermore, the Distribution Regulations include a *per se rule*, which treats a debt instrument as funding a distribution to an expanded group member or other

20 See Treas. Reg. § 1.385–3(b)(2).

21 See Treas. Reg. § 1.385–3(b)(3)(i).

transaction with a similar economic effect if it was issued in exchange for property during the period beginning 36 months before and ending 36 months after the issuer of the debt instrument made the distribution or undertook a transaction with a similar economic effect.[22]

To make the Distribution Regulations more streamlined and targeted, the Treasury Department and the IRS announced that they intend to issue proposed regulations substantially modifying the funding rule, including by withdrawing the per se rule. Treasury and the IRS intend that the proposed regulations would not treat a debt instrument as funding a distribution or economically similar transaction solely because of their temporal proximity; rather, the proposed regulations would apply the funding rule to a debt instrument only if its issuance has a sufficient factual connection to a distribution to a member of the taxpayer's expanded group or an economically similar transaction (for example, when the funding transaction and distribution or economically similar transaction are pursuant to an integrated plan). Thus, under the proposed regulations, a debt instrument issued without such a connection to a distribution or similar transaction would not be treated as stock.

The Treasury Department and the IRS requested comments on all aspects of the rules described in the Section 385 ANPRM. In particular, they requested comments on the appropriate standard for determining the existence of a connection between a debt instrument and a distribution or economically similar transaction under the funding rule.

IRS Issues Final and New Proposed Regulations on Base Erosion and Anti-Abuse Tax

On December 2, 2019, the U.S. Treasury Department and the IRS released final regulations (T.D. 9885) and proposed regulations (REG-112607-19) under section 59A, the BEAT. BEAT was added to the Code by the Tax Cuts and Jobs Act of 2017. BEAT imposes an additional tax on certain large corporate taxpayers that make "base erosion payments" (which include deductible payments and certain other categories of payments) to certain related foreign persons. BEAT applies in addition to a corporate taxpayer's income tax and can apply even in a year in which the taxpayer has no regular taxable income or in a year in which the taxpayer has a loss. The BEAT rate is 5% for tax years beginning in calendar year 2018, 10% for tax years beginning after calendar year 2018, and 12.5% for tax years beginning after December 31, 2025. The BEAT rate is one percentage point higher for any taxpayer that is a member of an affiliated group that includes a bank or a registered securities dealer. Treasury and the IRS previously published proposed regulations (REG-104259-18) under Section 59A on December 21, 2018. The 2019 final regulations finalize the 2018 proposed regulations and provide details on which taxpayers are subject to Section 59A and how base-erosion payments are determined. The final regulations also provide a method for calculating the base-erosion minimum amount and the BEAT resulting from that calculation. In addition, the final regulations describe

22 See Treas. Reg. § 1.385– 3(b)(3)(iii).

reporting and recordkeeping requirements for taxpayers subject to BEAT. The 2019 proposed regulations were issued in response to comments the IRS received on the earlier 2018 proposed regulations. For a summary of the 2019 final and proposed BEAT regulations, see our Legal Update.[23]

Warren Wealth Tax Proposal

Presidential candidate Elizabeth Warren unveiled her wealth tax proposal in early 2019, which would impose a wealth tax of 2% on wealth between $50 million and $1 billion, and a 3% tax on wealth above $1 billion. On November 1, 2019, Warren proposed an additional 3% surtax on wealth over $1 billion, bringing the total annual rate to 6% on every dollar over $1 billion.[24]

The "Ultra-Millionaire Tax" would tax the wealth of the richest Americans. It is estimated that approximately 75,000 households (those that are worth $50 million or more) would be affected by the proposed tax. Households would pay an annual 2% tax on every dollar of net worth above $50 million and a 6% tax on every dollar of net worth above $1 billion. In calculating a household's net worth, all assets held anywhere in the world, including residences, closely held businesses, assets held in trust, retirement assets, assets held by minor children, and personal property with a value of $50,000 or more, are included. According to Warren's proposal, this tax would generate approximately $3.75 trillion in revenue over a ten-year period.

Those taxpayers affected by the tax will have the option to defer payment of the tax for up to five years, with interest. Warren's proposal also includes strong anti-evasion measures, including, but not limited to: (i) a significant increase in the IRS enforcement budget, (ii) a minimum audit rate for taxpayers subject to the tax, (iii) a 40% "exit tax" on the net worth above $50 million of any US citizen who renounces their citizenship, and (iv) systematic third-party reporting that builds on existing tax information exchange agreements adopted after FATCA.

Final Nonresident Alien Withholding Regulations Offer Clarification and Certain Relief to Withholding Agents

On January 2, 2020, final regulations (T.D. 9890) (the "Final Regulations")[25] were published in the Federal Register which provide guidance on certain reporting rules applicable to withholding agents making U.S. source payments to foreign persons and guidance on certain aspects of FATCA reporting

23 Our Legal Update is available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/12/we-got-the-beat-article.pdf.

24 Details on the proposal are available at elizabethwarren.com/plans/ultra-millionaire-tax.

25 The Final Regulations are available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-27979.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list.

by foreign financial institutions on U.S. accounts. This article is a summary of several topics addressed in these Final Regulations.

The requirement for a withholding agent to obtain a foreign taxpayer identification number ("FTIN") and date of birth ("DOB")

Temporary regulations issued in 2017 (the "2017 Regulations") generally required, beginning January 1, 2017, a valid beneficial owner withholding certificate documenting an account maintained at a U.S. branch or office of a financial institution to include the account holder's FTIN (or a reasonable explanation of its absence), and in the case of an individual, the individual's DOB. In light of the difficulty for withholding agents to timely comply with the 2017 Regulations, Treasury and the IRS issued Notices 2017-26 and 2018-20, which generally (i) narrowed the application of the 2017 Regulations, (ii) provided withholding agents additional time to comply with the requirement to obtain such information, and (iii) provided transitional rules that phased in the requirement to obtain FTINs.

These Final Regulations generally adopt the 2017 Regulations and the provisions in Notices 2017-26 and 2018-20, with minor changes. Specifically, to the extent an IRS Form W-8 does not include an FTIN, the Final Regulations permit a withholding agent to rely on a separate written and signed statement containing the FTIN, provided the statement acknowledges it is part of the IRS Form W-8 on file. Note, however, a withholding agent will not be able to cure an invalid IRS Form W-8 signed on or after January 1, 2018 by orally receiving an FTIN.

Moreover, the Final Regulations clarify the standard of knowledge for reliance applicable to a DOB—a withholding agent may rely on a DOB on an IRS Form W-8BEN unless the withholding agent knows or has reason to know that the DOB is incorrect (e.g., the account holder's passport on file contains a different DOB). (This is the same standard of knowledge applicable to FTINs.)

The nonqualified intermediary withholding statement

As a general matter, an entity acting in a "nonqualified intermediary" capacity is generally required to provide a withholding agent with a Form W-8IMY, a withholding statement, and the documentation for each payee for which the intermediary receives a payment. However, the 2017 Regulations permitted nonqualified intermediaries to provide, and a withholding agent to rely on, an alternative version of a withholding statement which did not include the detailed information otherwise required so long as such information was already contained on the various withholding certificates of the payees. Nevertheless, the 2017 Regulations required the withholding statement to include the FATCA IRS Form 1042-S recipient code for each payee.

The Final Regulations remove the requirement for an "alternative withholding statement" to include the FATCA recipient code for one or more payees if the withholding agent is able to determine the appropriate recipient code based on other information included on, or associated with, the withholding statement or that is otherwise contained in the withholding agent's records with respect to the payee.

Electronically signed withholding certificates

The Final Regulations permit a withholding agent to rely on a withholding certificate and other documentation and information in the withholding agent's files to determine whether a withholding certificate is deemed electronically signed.

Permanent residence address subject to hold mail instructions

The 2017 Regulations allowed an address to be treated as a permanent residence address despite being subject to a hold mail instruction if the account holder provided documentary evidence establishing residence in the country where the account holder claims to be a resident for tax purposes. Proposed regulations issued in 2018 further explained that such documentary evidence must support the person's claim of foreign status, or for a person claiming treaty benefits, support the person's residence in the country where the person claims treaty benefits. The Final Regulations generally adopted the 2018 proposed regulations.

In the News

RECENT RECOGNITION

GlobalCapital has once again shortlisted Mayer Brown for Americas Law Firm of the Year for their 2020 Americas Derivatives Awards. We have been named Americas Law Firm of the Year in 2018 and 2019. In addition, Mayer Brown was named Global Law Firm of the Year at the 2019 Global Derivatives Awards.

Mayer Brown was named 2019 Tax Group of the Year by *Law360*. Mayer Brown was also named Firm of the Year for the fourth consecutive year in a row. No other firm has received this honor four years in a row.

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.

RECENT SPEAKING ENGAGEMENTS

The SEC's Concept Release on Exempt Offering: Will it Create Harmony? – On October 2, Michael Hermsen and Anna Pinedo led a PLI webinar which covered questions that were raised by the SEC's recent Concept Release on Harmonization of Securities Offering Exemptions. Discussion topics included: traditional private placements conducted under Section 4(a)(2) and Rule 506(b); the evolution of general solicitation and Rule 506(c); the motivations for using one of these approaches over another; integration of offerings in close proximity to one another and the changes in integration analyses over the years; choosing among a regulation A, a crowdfunded, and a Rule 506(c) offering; investor qualifications, sophistication and disclosure; and resale exemptions.

15th Annual Summit of the Structured Investment Industry - On October 8, Mayer Brown and the Structured Products Association hosted the 15th Annual Summit of the Structured Investment Industry. The event brought together industry leaders to discuss the latest developments in the structured products market and predictions for 2020. Anna Pinedo interviewed our keynote speaker, Representative Jim Himes (D-CT), during the Summit's "Financial Services Regulation: The Pendulum Swings Back" session.

REVERSEinquiries Workshop Series: ETNs and Daily Redeemable Notes – On October 16, Bradley Berman and Brennan Young hosted a webinar covering securities law and exchange requirements related to issuing ETNs and daily redeemable notes. Topics included securities law-related issues, including Regulation M considerations; exchange listing process; disclosure-related considerations; and regulatory concerns.

Practising Law Institute: Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures, Financings, Reorganizations & Restructurings – On October 17, Thomas Humphreys spoke on a panel entitled, "Interesting Corporate Transactions of the Past Year." Topics included: A review and critique of recent novel M&A transactions, including the impact of the 2017 Tax Act on recent transactions.

11th Annual Conference on Futures and Derivatives – On October 17, Matthew Kluchenek and Steven Schweitzer, Senior Director and Regional Head of Enforcement at CME Group, discussed CME Group disciplinary and investigatory considerations, including topics such as: advantages/disadvantages of global settlements; role and impact of cooperation; including self-reports; parallel investigations involving CME Group and the CFTC; use of prior cases in negotiating sanction determinations; pros and cons of taking cases to hearings; and negotiating notices of disciplinary action.

IFR US ECM Roundtable – On October 24, 2019, Anna Pinedo participated in a panel at the 8th annual IFR US ECM Roundtable. Topics included: the state of the IPO market; which industries/companies are transforming the economy; WeWork, what happened and who's to blame; direct listings as alternatives to the traditional IPO; SPACs: financial engineering in a bull market or durable funding vehicle; market outlook.

Preparing for the 2020 US Proxy and Annual Reporting Season – On November 6, Candace Jackson, Anna Pinedo, Ruchira Podali, and Laura Richman led a complimentary webinar to discuss issues impacting the upcoming proxy season. Topics included: critical audit matters; hedging disclosure; SEC guidance and process for shareholder proposals; trending shareholder proposals; environmental, social and governance disclosure; board diversity; pay ratio disclosure; say-on-pay and other compensation disclosure matters; director and officer questionnaires; risk factors; disclosure amendments impacting annual reports; Inline XBRL.

New York Bar Association – On November 6, Mayer Brown partners JoonBeom Pae, Jeff Davis and Mark Leeds spoke on Infrastructure Funds and Qualified Opportunity Zone Investments.

51st Annual Institute on Securities Regulations – On November 4-6, Mayer Brown hosted along with Practicing Law Institute a 3-day program on securities regulation. Anna Pinedo spoke on a panel entitled "Financing Issues Facing Late-Stage Private Companies and Smaller Reporting Companies." Topics that were covered included: the latest developments in capital markets, from unicorn IPOs to due diligence issues, to direct listings; financing issues for late-stage and smaller reporting companies, including structured notes, ICOs and more; the ABCs of ESG; disclosure challenges for public companies; workshop on engagement; a primer on proxy; accounting and auditing developments that companies, audit committees and counsel need to know; recent developments in Delaware law; what's trending in M&A; updates on enforcement priorities from state and federal regulators; the defense perspective on enforcement; and key considerations in bringing, defending and resolving private securities litigation.

Medium-Term Note Programs – On November 12, David Bakst and Bradley Berman led an Intelligize webinar on medium-term note programs. Topics that were covered included registered MTN programs and exempt MTN programs; diligence procedures, distributors and dealers; documentation; DTC issues; and Staff Legal Bulleting No. 19 and opinions.

Opportunity Zone Expo - Miami – On November 14, Mark Leeds presented on "OZ Investing 101: What are Opportunity Zones and How to Take Advantage of Them" at the Opportunity Zone Expo in Miami.

REVERSEinquiries Workshop Series; Platforms and Securities Law and Commercial Considerations – On November 14, Bradley Berman and Anna Pinedo led a webinar on platforms and securities law and commercial considerations. Topics included: broker-dealer and investment adviser registration requirements; section 11 and section 12 lability under the Securities Act; electronic media guidance; FINRA communications rule and social media guidance; and documenting the commercial arrangements.

3rd Debt Capital Markets Seminar – New Challenges for the Practice – On November 21, Dr. Berthold Kusserow, Anna Pinedo, James Taylor, Patrick Scholl and Alexei Dohl led a seminar on debt capital markets. D. Katja Kirchstein from the German Derivatives Association was featured as a guest speaker. Discussion topics included: the new Prospectus Regulation in the approval practice; the security of the future in electronic form; green, sustainable or social trends in the US and Europe; SFOR, SONIA, ESTR bonds in focus; the most important changes in CRR II and SRM II for MREL bank refinancing.

Preparing Periodic Disclosures for Life Sciences Companies & Areas of SEC Comment – On December 2, Anna Pinedo led a webcast that focused on the overall areas of focus identified by the SEC staff for public companies, the disclosure issues that members of the SEC staff have highlighted as important for upcoming annual reports on Form 10-K and Form 20-F, and discussed the particular hot button issues for life sciences companies. Specific topics included: SEC comment trends; a review of SEC proposed amendments to Regulation S-K disclosure requirements; early experience with CAM; revenue recognition comments relating to licensing and collaboration agreements; and other SEC disclosure areas of focus.

Market Trends in Corporate Transactions – On December 10, Anna Pinedo led a *Bloomberg Law* webinar focused on corporate transaction market evolution in 2019. The webinar covered an overview of key market trends, such as increased scrutiny on national security issues, and examined some drafting trends related to current events, including #MeToo and Brexit.

2020 NYS CPA Society Conference – On January 14, Mark Leeds participated on the Issues Relating to Modification of Swaps, Life Settlements, Litigation Financing and The Latest on New Financial Products on the Market panel at the NYS CPA Society Conference.

9th Annual IBA Finance and Capital Markets Tax Conference – On January 21, Mark Leeds chaired the Global Financing Techniques panel discussing the impact of the UK's anti-hybrid mismatch and interest limitation rules on financing transactions, new legislation in Italy permitting tax-exempt securitization structures, tax-efficient equipment sale-leasebacks structures available between Brazil, Italy and Spain, the impact of new French legislation requiring the application of the 'main purpose test' to cross-border financing structures, application of the European case law on beneficial ownership cases to financing structures and United States legislation limiting interest deductions and USA treaty update.

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