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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

Here at Mayer Brown Capital Markets Tax Quarterly we love to write about US tax legislation that may affect capital markets transactions. In the summer of 2021 there is no end of innovative, far-reaching and yes, grand, proposals for tax increases that would affect the capital markets. The Biden Administration has begun to winnow the campaign's broad tax proposals but how actual legislation will turn out is anyone's guess. Apart from getting agreement in a narrowly divided Congress, one large obstacle is the calendar. As the August legislative recess ("home working days" in the Senate calendar) begins, Congress has a little over a month of "voting days" left in 2021 to complete any significant legislation with a tax component. To give you an idea, after a month long August recess (a "district work period" in the House calendar) the dates when the House of Representatives is in session are limited to the last two weeks in September, the last two weeks in October, the first and third weeks of November, two days after the Thanksgiving weekend and the first two weeks in December. Of course, there are many more days on which House committees meet but, even so, time is running short for large pieces of legislation.

So Congress will have to work fast to complete work on two large infrastructure packages (or any legislation for that matter) this year. The first, the $1 billion "bipartisan" infrastructure package doesn't have much tax wise. The second, the $3.5 trillion "human" infrastructure package may contain lots of tax provisions. For this one, the jury is still out on (i) substantially increased capital gain rates for wealthy taxpayers, (ii) some form of wealth or mark-to-market taxation, (iii) treating death as a capital gain recognition event, and (iv) most recently, as discussed below, a scale back of the Tax Cuts and Jobs Act's 20% deduction for "qualified business income" including trade or business income

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

from partnerships and real estate investment trust ("REIT") and regulated investment company ("RIC") dividends.

Meanwhile, it appears that some taxpayers are not waiting to see how the tax increase saga turns out. On June 22, Bloomberg News reported that one large private company's sale to a private equity group was motivated in part by the owner's desire to recognize gain before rates are increased. According to the report, others apparently have had similar thoughts, with taxpayers considering whether some positions held for generations could be sold before any tax hike. This reminds us of New York County Surrogate Judge Gideon Tucker's oft quoted opinion in an 1866 case, The Final Accounting of A.B. No one's "life liberty or property is safe while the legislature is in session."[1] Put another way, lots can happen in a month of voting days.

In this issue of CMTQ, we also cover the ESG note trend and a related original issue discount issue, developments in an ongoing basket option Tax Court case, and more.

Tax Considerations for ESG Linked Notes

When deciding how to deploy capital, investors have become increasingly conscious about factors such as social responsibility and environmental, social and corporate governance ("ESG") standards. These factors have become synonymous with incentivizing good social behavior and increasing potential for sustained long-term growth. This increased correlation is evident across the global capital markets today. For example, one day after the Belarusian government, over an alleged bomb threat, forced passenger flight FR 4978 to land in Minsk and detained dissident journalist Roman Protasevich, there was a sell-off of Belarusian sovereign bonds. Granted, the sell-off was not huge, but the capital markets voiced their displeasure.

With the increased popularity and use of ESG investment standards in the market place, a number of recent financing arrangements have terms linked to various ESG goals. To illustrate the mechanics of a hypothetical ESG linked note, assume that pursuant to the terms of a ten year debt issuance, an issuer agrees to meet certain predetermined ESG targets (*e.g.*, Corporation X agrees to increase the use of renewable energy in the production of widget Y by 20% within three years). If, however, the issuer fails to meet the predetermined ESG targets, the instruments entitle the holders to additional interest (*e.g.*, an additional 75 basis points per year starting in year four). In other words, the issuer is penalized for failing to meet the promised ESG targets.

Putting tax aside, purchasing such ESG linked notes can be appealing to ESG conscious investors. However, issuers and prospective investors should be aware of the contingent payment debt instrument ("CPDI") rules found in Treasury Regulation section 1.1275-4. To the extent an ESG linked note is characterized as a CPDI, a holder would be required to accrue interest income over the note's

1 *Final Accounting in the Estate of A.B.*, 1 Tucker 248 (N.Y. Surr. 1866). The case involved a lawsuit against an attorney who was advising a decedent's heirs but who had failed to realize that the New York State Legislature had amended the inheritance laws.

term based on the issuer's "comparable yield" (i.e., the rate at which the issuer could issue a non-contingent fixed-rate debt instrument with terms and conditions similar to the ESG linked notes issued). The issuer would be entitled to claim interest deductions (if relevant) in the same amount. When the contingency resolves, the issuer and holder would make adjustments to the amount of interest deduction and inclusion. Additionally, a holder of a CPDI generally treats gain on sale as ordinary income rather than capital gain. These consequences apply to US taxpayers that hold CPDIs even if the issuer is a non-US issuer. Therefore, the CPDI rules add an additional level of US federal income tax complexity for both issuers and holders of notes subject to the CPDI rules – a complexity not all issuers and/or investors may want to entertain.

That said, not all (or even most) ESG linked notes are caught by the CPDI rules. One exception to the CPDI rules is for contingencies that are, as of the issue date, either "remote or incidental". For example, in the illustration above, the notes issued by Corporation X would fall under the remote exception to the CPDI rules if the chance of Corporation X having to pay any additional interest on the notes as a result of failing to meet its ESG target is remote. Whether such a contingency in an ESG linked note is considered remote is a question based on the facts and circumstances of a particular financing arrangement. What if Corporation X, as of the issue date, already has plans to start producing widget Y in a new manufacturing facility powered only by renewable energy and Corporation X expects to reach its ESG goal within the next few weeks and maintain compliance over the instrument's term? Such a factor would surely weigh in favor of meeting the remote exception. However, what if Corporation X, as of the issue date, has no tangible plans to increase the use of renewable energy in the production of widget Y and, in fact, Corporation X has a poor historic ESG track record? Such a factor would almost certainly weigh against meeting the remote exception.

In sum, whether an ESG-linked note is subject to the CPDI rules may not always be clear and should be carefully scrutinized.

Implications of Potential Section 199A Repeal for REITs

On July 20, 2021, Senate Finance Committee Chair Ron Wyden (D-OR) introduced the Small Business Tax Fairness Act,[2] aimed at simplifying the pass-through deduction under Code section 199A. Code section 199A, added to the Code by the Tax Cuts and Jobs Act in 2017, allows individuals, trusts and estates a 20% deduction for "qualified business income," which generally includes certain dividends from a REIT. Regulations permit RICs (including most mutual funds) holding REIT shares to pass this deduction on to their shareholders as well. The proposed legislation would make a number of important changes to the QDI regime. First, the proposal would generally phase out the deduction for individuals with more than $400,000 of taxable income in a taxable year and disallow it completely for individuals with $500,000 or more in taxable income. Second, to ensure the new

2 The text of the Small Business Tax Fairness Act is available at https://www.finance.senate.gov/imo/media/doc/7.19.21%20Small%20Business%20Tax%20Fairness%20Act.pdf.

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threshold is not available to a taxpayer twice, the proposal would prohibit trusts and estates from taking the deduction and would disallow the deduction for married taxpayers filing separately. Third, the proposal would make administrative changes to the treatment of "qualified REIT dividends," preserving the deduction for these dividends (but subject to the new cap described above). Finally, the proposal would codify regulations that permit RICs to pass REIT dividends eligible for the deduction on to shareholders of such companies.[3]

With or without the Small Business Tax Fairness Act, Code section 199A is set to expire for taxable years beginning after 2025.

Biden Administration Releases Green Book: Treatment of Capital Gains

On May 28, 2021, the Biden Administration (the "Administration") released its 2022 fiscal year budget, which outlines the Administration's proposals for discretionary spending, revenue and borrowing. The budget release was accompanied by the 114-page "Green Book,"[4] which lays out the Administration's legislative tax proposals for the 2022 fiscal year. Some of the Green Book proposals relating to changes with respect to capital gains are discussed below.

TAXATION OF CAPITAL INCOME FOR HIGH-INCOME EARNERS

Under current law, individual taxpayers are taxed at preferential rates on their long-term capital gains and qualified dividends as compared to ordinary income. The Administration proposes to tax individuals' long-term capital gains and qualified dividends at ordinary income tax rates, with 39.6 percent generally being the highest rate under the proposal (43.4 percent including the net investment income tax)[5] but only to the extent that the individual's adjusted gross income exceeds $1 million ($500,000 for married couples filing separately), indexed for inflation after 2022.

The Green Book makes it clear that the proposal would be effective for gain recognized after the date of the announcement, which is April 28, 2021, or the date when President Biden announced the proposal as part of the American Families Plan.

REALIZATION EVENT TREATMENT FOR TRANSFERS OF APPRECIATED PROPERTY BY GIFT OR ON DEATH

Currently, gifts and transfers upon death are not treated as taxable events. A decedent's heirs generally take a "stepped up" fair market value basis in the decedent's assets upon death, with no U.S. federal income tax due at that time. Under the Administration proposal, the donor or deceased

3 The proposal also codifies the pass-through of the deduction for certain publicly traded partnerships.

4 Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals*, https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf.

5 The current highest individual rate is 37% (40.8% including the net investment income tax).

owner of an appreciated asset would recognize capital gain at the time of the transfer to a donee or heir, as applicable, based on the asset's fair market value at the time of transfer. The proposal would also require the recognition of gain on unrealized appreciation by partnerships, trusts, and other non-corporate entities that are the owners of the property if that property has not been subject to a recognition event in the prior 90 years. In addition, the proposal would treat otherwise tax-deferred individual contributions to, or distributions from, partnerships, trusts, and other non-corporate entities as taxable events.

Certain limited exemptions would apply, including gifts to charitable recipients and spouses, distributions from a grantor trust to discharge an obligation of the grantor, transfers of personal and/or household items, and exemptions below certain dollar thresholds. In addition these exclusions, the proposal would allow a $1 million per-person exclusion from recognition of other unrealized capital gains on property transferred by gift or held at death.

This proposal would be effective for gifts made and property owned at death by decedents dying after December 31, 2021, and for certain property of trusts, partnerships and other non-corporate entities on January 1, 2022.

TAM 202121009: Capitalizing Payments to Purchase a Debt Instrument

SUMMARY

On May 28, 2021, the IRS published TAM 202121009,[6] confirming that certain payments made to acquire financing agreements, in excess of the principal amount of such agreements, should be capitalized as costs paid to acquire an intangible debt instrument.

Following, we briefly summarize the relevant provisions of the Code[7] relating to deductible and nondeductible capital expenditures and we analyze the facts and law that the IRS considered in TAM 202121009.

DEDUCTION VS. CAPITALIZATION – GENERAL BACKGROUND

Code section 162(a) of the Code allows a current deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Code section 263(a) provides, in part, that no deduction shall be allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate. Instead, many of these expenses are capitalized.

6 TAM 202121009 (May 28, 2021)

7 The Internal Revenue Code of 1986, as amended.

Regulations published under Code section 263 require a taxpayer to capitalize amounts paid to acquire intangible assets.[8] The regulations also provide that a taxpayer must capitalize amounts paid to another party to acquire any intangible from that party in a purchase or similar transaction.[9] For these purposes, an intangible includes, but is not limited to, a debt instrument, deposit, stripped bond, stripped coupon, or any other intangible treated as debt for federal income tax purposes.

The Supreme Court has weighed in on the difference between a deductible expense and a nondeductible capital expenditure, and held that because deductions are specifically enumerated in the Code and nondeductible capital expenditures are not exhaustively enumerated, expenses that are not specifically enumerated as deductible are subject to disallowance in favor of capitalization.[10]

THE IRS CLARIFIES THAT CERTAIN PAYMENTS TO ACQUIRE A FINANCING AGREEMENT SHOULD BE CAPITALIZED

According to the IRS, in a typical product retailer financing arrangement, Seller and Purchaser enter into a single Agreement which includes (1) the terms for the sale of the product, and (2) the terms for any financing that Purchaser requires to acquire the product from Seller. Seller then submits the credit application information it obtained from the Purchaser for the financing prong of the Agreement to one of several standardized information platforms which compile, with other credit information, a data file about the Agreement. The data file is then sent to competing finance companies which bid to purchase the Agreement from the Seller. Seller then selects a finance company — in general, the one offering the greatest compensation — to which it will sell the Agreement.

In TAM 202121009, the Taxpayer manufactured certain Products and owned a Finance Company that was a captive finance subsidiary of Taxpayer and a member of its consolidated group. As part of its business, the Finance Company purchased financing agreements originated by independent retailers from sales of products to third party Product Purchasers. The acquisition of the financing agreements were documented in contracts between the Finance Company and the independent retailers. Under the terms of these contracts, the purchase price for the financing agreements equaled their principal amount. The Taxpayer capitalizes the purchase price of the financing agreements and the IRS agrees with this treatment.

The contracts also included a description of the terms of Finance Company's retailer program pursuant to which Finance Company agreed to make several payments to the independent retailers. Under the first payment, if the minimum interest rate Finance Company required to purchase the financing agreements ("buy rate") was equal to or greater than the interest rate the independent retailer negotiated with the Purchasers ("retail rate"), Finance Company paid the independent retailer a payment based on the amount financed. Under the second payment, Finance Company made a payment to each independent retailer that sold a target number of financing agreements to Finance

8 Treas. Reg. 1.263(a)-4(b)(1)(i).

9 Treas. Reg. 1.263(a)-4(c)(1)

10 *Indopco, Inc. v. Commissioner*, 503 U.S. 79, 112 S.Ct. 1039 [69 AFTR 2d 92-694] (1992).

Company during a specific period. Finally, Finance Company also made payments to each independent retailer that financed Taxpayer's wholesale new Product inventory through Finance Company. All of these payments were tracked to each specific financing agreement but were paid separately from the purchase price paid in respect of the financing agreements.

The Taxpayer deducted the payments made pursuant to the retailer program and argued that these payments should be viewed as an advertising and promotional expense because they were separate from the payments made to purchase the financing agreements. The IRS disagreed and ruled that payments made under the retailer program should be capitalized as a payment to acquire an intangible. The IRS reasoned the retailer program only included the amount Finance Company agreed to pay as compensation to an independent retailer for selling Finance Company below-market, at-market, or above-market financing agreements. As a result, according to the IRS, these payments provided a direct benefit to the independent retailers; however, retailer program provided little, if any, benefit to a Product Purchaser who was unlikely to know that Finance Company's buy rate was less than the financing agreement rate it negotiated with each independent retailer.

Therefore, the IRS held that payments made by Finance Company pursuant to its retailer program were not a deductible sales and marketing expenses and are instead amounts paid to acquire intangible debt instruments that should be capitalized under Treas. Reg. section 1.263(a)-4(b)(1)(i) and section 1.263(a)-4(c)(1).

Global Minimum Tax

On July 10, 2021, the G20 endorsed a broad framework to advance the OECD's Pillars One and Two. The endorsement came in a Communiqué, which approved the July 1 statement by the 139-country Inclusive Framework (the "IF Statement"). The G20 agreement represents a political consensus on a substantial revision to global tax policy.

The overarching objective of Pillar Two is to ensure that a minimum level of taxation is paid by a multinational company and ensure that deductible payments by such companies are subject to a minimum rate of tax in the hands of the recipient. Pillar Two will apply to multinational enterprises that meet the relevant annual revenue threshold for country-by-country reporting, generally EUR 750 million or USD 850 million for US-parented multinational enterprises. The IF Statement enshrines the objective of Pillar Two by establishing a global minimum tax rate of at least 15%. Importantly, the 15% threshold would be tested on a country-by-country basis to eliminate the ability of multinationals to average high-tax and low-tax country profits.

The IF Statement should be read in conjunction with the Biden Administration's proposals that would raise the tax on global intangible low-tax income, or GILTI income, to 21%, test GILTI on a country-by-country basis and eliminate the GILTI benefit for a 10% return on tangible property constituting qualified business asset investment (QBAI). Moreover, the Administration proposes to reconfigure the

base erosion and anti-abuse tax (BEAT) regime by denying deductions to related parties where the recipient or a member of the recipient's group is not subject to a minimum level of taxation.

For further information, Mayer Brown has extensive coverage of OECD developments, available at.

- https://www.mayerbrown.com/en/perspectives-events/publications/2021/07/g20-agrees-on-framework-for-pillars-one-and-two-and-targets-2023-effective-date; and
- https://www.mayerbrown.com/en/perspectives-events/events/2021/07/deja-vu-all-over-again--bracing-for-another-round-of-us-and-global-tax-reform

LB&I Adds Campaign on Non-U.S. Lenders

On June 10, 2021, the IRS added to its list of active "Large Business & International Campaigns" an initiative to address whether foreign investors should be subject to US tax on effectively connected income from lending transactions. As a general rule, non-US persons are subject to US taxation on a net basis if they are engaged in a US trade or business. Under the "trading safe harbor" of Code section 864(b)(2), trading or investing in stocks or securities for a taxpayer's own account does not cause a non-US person to be treated as engage in a US trade or business. If this safe harbor applies, a non-US person can invest in stocks and securities without being subject to US tax on capital gains when they are sold. In the case of debt instruments, non-US investors can also generally qualify for the portfolio interest exemption and receive interest that is not subject to US withholding tax.

The IRS has previously held in private guidance that the trading safe harbor does not apply to loan origination activity.[11] Thus, non-US persons engaged in loan origination activity in the United States may be treated as engaged in a US trade or business. According to the IRS in the previous private guidance, origination activity can include not only loans that are originated by the taxpayer directly, but also loans that are originated by an agent that are subsequently purchased by the taxpayer. Non-US credit funds, for example, go to great lengths to ensure that secondary market loan purchases cannot be recast by the IRS as origination activity.

By adding this issue as new campaign to address whether foreign investors should be subject to US tax on effectively connected income from lending transactions, the IRS has indicated renewed focus policing this high-stakes area. For more discussion on how this new campaign affects credit funds, please see our client alert available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/06/irs-adds-offshore-credit-funds-to-their-active-audit-campaign.pdf.

11 AM 2009-010 (September 22, 2009).

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Latest Development in Basket Option Tax Court Case

In our October 31, 2019 issue of CMTQ,[12] we discussed a Tax Court petition filed by a partnership challenging the IRS's position that the partnership owned the reference stocks included in certain basket option contracts the partnership entered into with a bank.[13]

In the transaction at issue, the partnership entered into basket option contracts with a bank under which the partnership was entitled to receive a return based on the performance of notional portfolios of reference securities. When the contracts were terminated, the partnership treated the entire gain from settling the contracts as long-term capital gain. The IRS assessed a deficiency by imputing direct ownership of the underlying securities in the portfolios to the partnership and arguing each disposition was subject to short-term capital gain and ordinary income tax rates.

The case is set for trial in March 2022.

In May this year, the partnership filed a motion for partial summary judgment and an accompanying declaration, asking the Tax Court to hold that a Code section 475(f)(1) mark-to-market election made by a disregarded entity wholly owned by the partnership applied only to securities held by the disregarded entity in its securities trading business and did not apply to any other securities. The IRS had determined that the disregarded entity's election applied to securities referenced in the basket option contracts entered into between the partnership and the bank, even though the securities were not directly held by the disregarded entity in its securities trading business. The partnership in its motion stated that the disregarded entity's election was made in 1998. The partnership entered into the basket option contracts with the bank between 2003 and 2006.

For US federal income tax purposes, gain or loss from a security held for investment is generally realized and recognized only when the security is sold or otherwise disposed of. Such gain or loss is characterized as long-or short-term capital gain or loss depending on the security's holding period. Code section 475(f) provides an exception to the general rule by allowing a person who is engaged in a trade or business as a "trader in securities" to elect to treat securities held in connection with such trade or business at the end of the taxable year as if they were sold on the last day of that year for fair market value. The electing trader instead realizes ordinary gains and losses for such securities. Once a securities trader has made a valid Code section 475(f) election, it must continue to mark to market its securities unless the IRS otherwise consents.

The partnership's motion for partial summary judgment argued that the disregarded entity was a separate "person" under Code section 7701(a)(1) and the related regulations because it had a legal personality separate from the partnership and possessed legal rights and powers that are similar to those enjoyed by the other persons enumerated in Code section 7701(a)(1). The partnership argued that for Code section 475(f) purposes therefore the disregarded entity was a separate person that

12 The issue is available at: https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/10/capital-markets-tax-quarterly-volume-2-issue-3--oct-2019.pdf.

13 GWA, LLC v. Commissioner, U.S.T.C Docket No. 6981-19 (Filed May 1, 2019).

could elect to mark its securities to market, even though its gains and losses were reported on the partnership's tax returns.

The motion cited case law to support the proposition that a disregarded entity can be a person as defined in Code section 7701(a)(1) and contended that applying the Code section 7701(a)(1) definition of person for purposes of the mark-to-market election is consistent with Congressional intent. The motion also argued that even though the partnership itself qualifies as a person under Code section 7701(a)(1), because it was not engaged in a securities trading business, it was not eligible to and did not elect mark-to-market treatment for its securities. The motion asked the court to rule that as a matter of law Code section 475(f) cannot apply to any securities other than those directly held by the disregarded entity in its securities trading business.[14]

Another Cum-Ex Development

As we reported last quarter, foreign countries continue to investigate cum-ex trades. Generally speaking, in a cum-ex trade, Party A in country Y agrees to transfer shares in a country X company to Party B in country Z around the time of a dividend payment. The actual owner of the shares may be unclear to the taxing authorities. Tax treaties between country X and countries Y and Z permit taxpayers subject to withholding to receive a refund for tax withheld. In the cum-ex structure, due to the uncertainty of ownership, both Party A and Party B claim the refund for tax withheld, even though the tax may have been withheld only once or not at all. On June 16, 2021, the Danish tax authority filed suit in the U.S. District Court for the Southern District of New York against a New York-based attorney for purportedly setting up cum-ex arrangement for Code section 401(k) pension plans.[15] The Danish tax authority alleges that the arrangement was a conspiracy to defraud Denmark, with the amounts at issue totaling approximately $260 million.

In the News

RECENT RECOGNITION

- John Ablan and Ryan Castillo recognized as "Rising Stars" in *Euromoney's Rising Stars Expert Guide 2021* for Capital Markets*, July 16, 2021*
- Marla Matusic recognized as a "Rising Star" in *Euromoney's Rising Stars Expert Guide 2021* for Structured Finance and Securitization*, July 16, 2021*

14 Note to draft: asking the library tomorrow if there is an update.

15 See Complaint*, Skatteforvaltningen v. Michael Ben-Jacob* (S.D.N.Y. 2021) (No. 1:21-cv-05339).

- The 2021 edition of *Chambers USA* recognized 144 of our lawyers with 167 total rankings or listings in 52 practice categories, including 29 lawyers who achieved a total of 30 Band One or higher rankings, *July 12, 2021*

Individuals recognized include:

  - *Senior Statespeople* | Phyllis Korff – Capital Markets: Debt & Equity: Eastern United States, Nationwide
  - *Band One* | Anna Pinedo – Capital Markets: Structured Products, Nationwide
  - *Band One* | Jon Van Gorp – Capital Markets: Securitization: RMBS, Nationwide
  - *Band One* | Joel Williamson – Tax Controversy, Nationwide
  - *Band Three* | Brian Kittle – Tax Controversy, Nationwide
  - *Band Three* | Tom Kittle-Kamp – Tax Controversy, Nationwide
  - *Band Two* | James Barry – Tax, Illinois
  - *Band Four* | George Craven – Tax, Illinois
  - *Star Individual* | Joel Williamson – Tax Controversy, Illinois
  - *Band One* | Tom Kittle-Kamp – Tax Controversy, Illinois
  - *Band Two* | Scott Stewart – Tax Controversy, Illinois
  - *Band Three* | John Hildy – Tax Controversy, Illinois
  - *Band Four* | Jason Bazar – Tax, New York
  - *Band Five* | Russell Nance – Tax, New York
  - *Band Two* | Leah Robinson – Tax - State & Local, New York
  - *Senior Statesman* | Ed Osterberg – Tax, Texas
  - *Band Two* | Shawn O'Brien – Tax - Litigation, Texas
  - *Senior Statesman* | Larry Langdon – Tax, North California

The 2021 edition also ranked the Firm Band One in 52 practice categories, including:

  - Capital Markets: Securitization: ABS
  - Capital Markets: Securitization: RMBS
  - Capital Markets: Structured Products
  - Tax Controversy

- Mayer Brown wins "Deal of the Year" in *Airfinance Journal* Awards 2020, *June 23, 2021*
  The *Airfinance Journal Awards* recognize the most innovative transactions, teams and individuals in aviation finance. Mayer Brown advised on a transaction recognized as the "Deal of the Year" in the *Airfinance Journal Awards 2020*. The winning transaction: Overall Deal of the year: United Airlines | Mileage Plus Programme | 07-20 | $6.8bn

- Mayer Brown advised Goldman Sachs Lending Partners LLC, as sole structuring agent and lead left arranger and bookrunner, and Goldman Sachs Bank, as administrative agent, on a first-of-its-kind $6.8 billion financing consisting of $3.8 billion of senior secured high yield bonds and $3 billion of senior secured institutional term loans to United Airline's loyalty program, MileagePlus. The innovative transaction involved the contribution of intellectual property of the MileagePlus program to a newly formed subsidiary that was structured to be bankruptcy remote and involved a covenant structure that is a hybrid between a securitization and a corporate debt issuance.

- The team was led by: Banking & Finance – Gabriela Sakamoto, Stuart Litwin, Jan Stewart, Beth Vogel, Jennifer Bruni, Adam Wolk; Restructuring – Sean Scott and Richard Ziegler; Corporate & Securities – John Berkery and John Ablan; Tax Transactions & Consulting – Michael Lebovitz; and IP – Erick Palmer.

The Legal 500 US 2021 ranks Mayer Brown in 57 categories, with 23 lawyers recognized as "Leading Individuals", *June 16, 2021*

Category: Finance

- Capital Markets: Debt Offerings: Advice to Issuers
- Capital Markets: Debt Offerings: Advice to Underwriters
- Capital Markets: Equity Offerings: Advice to Issuers
- Capital Markets: Equity Offerings: Advice to Managers
- Capital Markets: Global Offerings: Advice to Issuers
- Capital Markets: Global Offerings: Advice to Underwriters
- Capital Markets: High-Yield Debt Offerings: Advice to Issuers
- Capital Markets: High-Yield Debt Offerings: Advice to Underwriters
- Structured Finance: Derivatives and Structured Products
- Structured Finance: Securitization

<u>Category: Tax</u>

- Financial Products
- US Taxes: Non-contentious
- US Taxes: Contentious
- International Tax

The publication recognized individual lawyers in the following rankings:

- *Leading Individual* | Anna Pinedo – Finance: Structured Finance: Derivatives and Structured Products; and Finance: Capital Markets: Global Offerings
- *Leading Individual* | Brian Kittle – US Taxes: Contentious
- *Leading Individual* | John Hildy – US Taxes: Contentious
- *Leading Individual* | James Barry – US Taxes: Non-Contentious
- *Leading Individual* | Jason Bazar – US Taxes: Non-Contentious
- *Leading Individual* | Thomas Humphreys – Tax: Financial Products
- *Leading Individual* | Mark Leeds – Tax: Financial Products
- *Hall of Fame* | Paul Forrester – Finance: Structured Finance: Securitization
- *Hall of Fame* | Jon Van Gorp – Finance: Structured Finance: Securitization
- *Hall of Fame* | Tom Kittle-Kamp – US Taxes: Contentious
- *Hall of Fame* | Larry Langdon – US Taxes: Contentious
- *Hall of Fame* | Joel Williamson – US Taxes: Contentious
- *Hall of Fame* | Ken Klein – International Tax
- *Next Generation Lawyer* | Ryan Castillo – Capital Markets: Debt Offerings
- *Next Generation Lawyer* | Remmelt Reigersman – Tax: Financial Products
- *Rising Lawyer* | Marla Matusic – Finance: Structured Finance: Derivatives and Structured Products

- Mayer Brown Corporate & Securities partner Esther Chang named a 2021 "Top Rising Star" by *The Deal*, May *24, 2021*

- Partners Recognized in *IFLR1000* 2021 Women Leaders Guide, *May 6, 2021*
  - *Anna Pinedo*, Corporate & Securities – recognized as a "Market Leader," the guide's highest individual distinction, in five Capital Markets categories (Equity, Debt, High Yield, Derivatives and Structured Finance & Securitization) and recognized for the banking and financial services sectors
  - *Elizabeth Raymond*, Corporate & Securities – ranked as "Highly Regarded" in the M&A category and for the financial services sector

RECENT SPEAKING ENGAGEMENTS

Upcoming – Best Practices for Earnings Calls and Investor Updates | Practices for public companies relating to earnings calls, earnings guidance and investor updates vary. Especially in uncertain and volatile markets, preparing for these important communications requires careful consideration of a number of factors, including the recent statements and guidance from the Securities and Exchange Commission and SEC Staff. Hosted by *Intelligize* on August 4, 2021, Mayer Brown's David Freed and Laura Richman will address materiality and when an issuer has a duty to disclose; trend information and earnings guidance; non-GAAP financial measures and KPIs; forward-looking statements and cautionary statements; SEC guidance related to COVID-19; and financings after earnings announcements and before quarterly reports are filed. *Register for this session here.*

Convertible Bonds – Recently, convertible bonds have been among the most popular financing tools. Mayer Brown partners, Anna Pinedo and Remmelt Reigersman, as well as Raymond James' Co-head of Equity-Linked Securities, Claude DeSouza-Lawrence, and Director, Peter Pergola, held a session on converts on June 29, 2021, where they discussed the state of the market, provided an overview on convertible bonds, simplified accounting treatment for issuers, discussed antidilutive strategies, including capped call and call/warrant structures, discussed tax considerations for the issuer, addressed busted converts; and covered other securities and disclosure considerations.

Good Corporate Hygiene: Part 1: Share trading and repurchases – Under SEC Chair Clayton's leadership, there was a focus on a number of areas collectively termed "good corporate hygiene." These subsumed policies related to trading in a company's stock, especially the use of Rule 10b5-1 trading plans and the use of such plans by insiders, as well as corporate policies, including corporate repurchase plans, Regulation FD policies, and policies relating to the handling of material nonpublic information. Various academic studies and some well-publicized sales by corporate executives made pursuant to 10b5-1 trading plans have drawn media scrutiny and attention from legislators, prompting calls for the SEC to take a closer look at the area. Also, despite the pandemic, share repurchase activity has remained high, and that has raised questions. In the first of a two-part series addressing corporate hygiene on June 21, 2021, Mayer Brown covered topics relating to share trading and repurchases, including Rule 10b5-1 best practices, studies relating to sales practices, Rule 10b-18 programs, accelerated share repurchase plans, activity by insiders in proximity to corporate

repurchases, as well as controls related to insider trading and blackout conditions, and handling material nonpublic information.

Liability Management – Issuers in a range of industry sectors may now be evaluating potential liability management transactions, including debt repurchases and tenders or exchange offers. In some cases, no-action letter relief may provide issuers and their advisers with greater flexibility for tender offers for non-convertible debt securities, including non-investment grade debt securities. Mayer Brown partners Eddie Best and Anna Pinedo were joined by Associate Brennan Young and RBC Capital Markets' Salim Mawani in this June 18, 2021 event to discuss disclosure issues and handling material non-public information, structuring repurchases to avoid the application of the tender offer rules, repurchasing debt trading at a discount, handling busted convertible notes, tender offer rules, no-action letter relief for non-convertible debt securities, consent solicitations, and tax considerations.

Déjà Vu All Over Again – Bracing for Another Round of US and Global Tax Reform – Mayer Brown hosted a webinar on July 15 focusing on the G20 meeting held earlier that month and the landmark agreement by the G7 to re-scope and advance Pillar One and Pillar Two. Mayer Brown partners Jenny Austin, Lucas Giardelli, James Hill, Ken Klein, Mike Lebovitz and Warren Payne discussed the outcome of the G20 meetings and the interaction with the Biden proposals while also providing predictions on whether—and, if so, when—to expect actual legislation or agreement among the OECD countries and suggestions for how multinationals can prepare for another round of changes to the global tax landscape.

2021 Opportunity Zone Expo - Denver – On July 15, 2021, Mayer Brown tax partner Mark Leeds participated in the 2021 Opportunity Zone Expo, speaking on a panel entitled: "What's new in Opportunity Zone legislation and practices in our post-COVID economy" held in Denver, CO.

Medium-Term Note Programs – MTN programs are continuous offering programs that enable issuers to offer debt securities in an efficient and expedited manner. MTN programs have unique documentation, as opposed to benchmark underwritten offerings. Most MTN programs have the ability to offer debt securities, with maturities of more than 270 days and to up to 30 years. During an event on June 8, 2021, Mayer Brown covered registered MTN programs and exempt MTN programs, diligence procedures, distributors, and dealers, respective documentation, and other hot topics, such as Benchmark Replacement, Brexit, COVID-19 disclosures, ESG developments, and new ISDA definitions.

Tax Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures and Other Strategic Alliances 2021 Part Two – On June 8, 2021, Mayer Brown tax partner Greg Matlock participated on a panel titled "Public and Private Oil and Gas Partnerships."

Strategies For Concentrated Positions In Company Stock – On May 26, 2021, MyStockOptions.com hosted a webinar on managing concentrated positions in company stock. During the 100 minutes, speakers including Mayer Brown partner Mark Leeds participated in a discussion addressing key concepts such as strategies to diversify and create liquidity and/or protect the stock in a tax-efficient way; basic strategies (sales, gifts, and charitable donations of stock); short-term strategies (protective

puts, covered calls, collars, and forwards); long-term strategies (exchange funds and stock protection trusts); tax, legal, and SEC complexities, and actual case studies.

Merging with a SPAC & Preparing for Life as a Public Company – On May 18, 2021, Anna Pinedo was joined by Daniel Klausner and Richard Sola of PwC to discuss the main elements of the public company preparedness process and how these might be coordinated or timed in conjunction with a de-SPAC process. Specifically, the panelists covered the SPAC market, recent SEC Staff Statements on SPACs, timing and process for SPAC initial business combinations, the timing and process for public company readiness assessments, corporate governance best practices and other compliance considerations, expectations regarding disclosure controls and internal control over financial reporting, and they gave tips for planning ahead for timely earnings reports and periodic filings.

2021 Structured Products Legal, Regulatory & Market Briefing – On May 13, 2021, the Structured Products Association and Mayer Brown hosted a briefing to hear from industry leaders on the latest legal, regulatory and market developments in the structured products market. This briefing will include four short panels covering innovations in ESG-linked structures, latest Developments in structured investments trading and technology, updates on the LIBOR transition, ARCC developments, the IBOR Protocol and the New York State legislation, and SEC, FINRA, and CFTC Regulatory priorities and enforcement expectations under the Biden Administration.

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