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MAYER BROWN CAPITAL MARKETS

TAXQUARTERLY

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

VOLUME 05, ISSUE 01 | May 23, 2022

Editor's Note

Each year, the US Administration submits its budget to Congress. Accompanying the budget is a separate document titled "General Explanations of the Administration's Revenue Proposals," or "Greenbook" prepared by the US Treasury. It explains the revenue measures in the President's Budget. In this year's Greenbook, released in March, the Biden Administration proposes a Billionaire's Minimum Income Tax ("BMIT") which we discuss beginning on pp. 3. Capital Markets Tax Quarterly has reported on "billionaires taxes" before, going all the way back to the 2020 Democratic Party presidential primaries. Last fall, Sen. Ron Wyden (D., OR) floated one as part of the Build Back Better debate.[1] The proposal, which he dubbed the "Billionaire's Income Tax" or "BIT" fell flat, but that didn't stop the Administration from proposing another "billionaires" tax in the Greenbook. Reading beyond the headlines, the BIT and the BMIT are actually very different. BIT would force all taxpayers with either $100 million in annual income or $1 billion in assets onto a "mark-to-market" system for tradable assets and also impose an anti-deferral tax when non-tradable assets are sold. Long-term capital gain rates would apply to the MTM gain and existing tax rates would apply to recognized gain on non-tradable assets. The Biden BMIT, on the other hand, would lay a minimum tax on top of the existing federal tax system to be

In This Issue

1 For our prior coverage, see CMTQ Vol. 4, Issue 3, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/11/capital-markets-tax-newsletter--volume-4-issue-3final2.pdf Wyden's draft legislation is available at https://www.finance.senate.gov/imo/media/doc/Billionaires%20Income%20Tax.pdf

imposed on "total income" in excess of $100 million a year. Generally speaking, the minimum tax, as the name suggests, would only be paid if it exceeded a taxpayer's regular tax. "Total income" would include income and gain under existing law but also unrealized capital gains of the affected taxpayers. Therefore, the Biden plan would require valuation of non-tradable assets. Also, "illiquid" taxpayers (those with less than 20% of their wealth in tradable assets) could elect to include only unrealized gain in their minimum tax base under Biden's plan. These taxpayers would be subject to a deferral charge on the realization of gains on non-tradable assets that would not exceed ten percent of unrealized gain.

If it all sounds complicated, believe us, it is. One can only imagine the tax planning that would go into advising the affected individuals particularly in conjunction with whatever estate tax changes accompanied a billionaires tax (the Biden proposal includes gain recognition at death). CMTQ also wondered whether the changes in the BMIT vs the BIT were made with an eye to garnering support from Sen. Joe Manchin (D.WV). Within a few days of its release, however, Sen. Manchin announced that he did not favor the BMIT, so its fate is uncertain at best.

The BMIT and other proposals in the Greenbook are certainly grand proposals. Reality in 2022, however, may be less grand. The reader will recall that around this time last year, we studied the Congressional calendar and came away concluding that Congress had to act fast to pass ambitious legislation proposed by the incoming Biden Administration. The result was passage of the Infrastructure Investment and Jobs Act (dubbed the "Bipartisan Infrastructure Act") but not of the Build Back Better Act. This year, the calendar is equally revealing: in the House both August and October (actually through Election Day on November 8) are District Work Periods, i.e, when the House is not in session. The schedule for the Senate includes the full August break and only nine session days in October. So September seems to be the last time both House and Senate will be together in Washington DC and in session before Election Day. Not much time to do anything (for better or worse) until after the US mid-term elections in November.

This edition of CMTQ includes a chart comparing the BMIT and BIT and also covers the revocation of a REIT ruling on what constitutes qualifying rental income, recent LIBOR replacement legislation (which is missing any tax provisions), and more.

Billionaire's Minimum Income Tax—Summary of Proposal/How it Differs from Wyden Proposal

Looking for ways to help fund the Build Back Better agenda last October, as noted above, Sen. Ron Wyden proposed a billionaires income tax, taxing certain unrealized gains of U.S. taxpayers worth over $1 billion for three consecutive years (as well as U.S. taxpayers that earned over $100 million in three consecutive years).[2] The proposal was not long lived, however, as Senator Joe Manchin (D., WV), a Democrat whose support in an evenly decided Senate was critical to the proposal's success, spoke out against the idea.[3]

As of this past March, a different billionaires tax surfaced in the Greenbook. The Biden Administration billionaires tax proposes a minimum tax of 20 percent on something called "total income," including certain unrealized capital gains, for all taxpayers who are worth more than $100 million.[4] A press release by the White House stated its belief that such a tax will make the tax code fairer and also reduce the US deficit by $360 billion over the next decade.[5] The tax press quickly brought out tax law experts, some of whom had expressed doubts about the constitutionality of last October's proposal,[6] and who now have their doubts about this new proposal's constitutionality as well as its ability to be anything more than a political aspiration.[7] While the White House continues to tout the proposal, Senator Manchin has already said that he will not support this iteration either.[8]

The following chart compares the two proposals:

2 The prior proposal is available at https://www.finance.senate.gov/imo/media/doc/Billionaires%20Income%20Tax%20-%20Section-by-Section.pdf For our prior coverage, see Volume 04, Issue 03, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/11/capital-markets-tax-newsletter--volume-4-issue-3final2.pdf

3 See Jonathan Ponciano, Billionaire Tax Dead on Arrival After Manchin Blasts Proposal Mere Hours After Its Reals (October 27, 2021), available at https://www.forbes.com/sites/jonathanponciano/2021/10/27/billionaire-tax-dead-on-arrival-after-manchin-blasts-proposal-mere-hours-after-its-release/?sh=5186e636bc36

4 The 2023 Greenbook is available at https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf; parts of the Biden BIT look a lot like a tax proposed by a member of the tax bar in 2011. See Taxation of Financial Products, Joint Hearing of the U.S. Senate Committee on Finance and the U.S. Committee on Ways and Means (testimony by David S. Miller)(Dec 6, 2011) and Miller, "The Zuckerberg Tax," New York Times, Feb. 7, 2012.

5 See https://www.whitehouse.gov/omb/briefing-room/2022/03/28/presidents-budget-rewards-work-not-wealth-with-new-billionaire-minimum-income-tax/

6 See Jonathan Allen, Billionaires Tax Faces Constitutional Scrutiny, Political Hurdles (October 27, 2021), available at https://www.nbcnews.com/politics/politics-news/billionaires-tax-faces-constitutional-political-hurdles-n1282453

7 See Jonathan Curry, Tax Pros Eye Biden's Estate Tax Plans, Shrug Off Billionaire's Tax (April 1, 2022), available at https://www.taxnotes.com/tax-notes-today-federal/trusts-and-estates-taxation/tax-pros-eye-bidens-estate-tax-plans-shrug-billionaires-tax/2022/04/01/7dbll

8 See Zachary Snowdon Smith, Manchin Rejects 20% Tax For Billionaires: 'Everybody Has To Pay Their Fair Share' (March 29, 2022), available at https://www.forbes.com/sites/zacharysmith/2022/03/29/manchin-rejects-20-tax-for-billionaires-everybody-has-to-pay-their-fair-share/?sh=1e37a707789a

Proposal[9]	Biden BMIT	Wyden BIT
Tax Base	"total income generally inclusive of unrealized capital gains."	MTM for tradable assets Deferral charge on non-tradable assets, pay normal tax rate plus deferral charge but only when sold
Rate	20% Less unrefunded, uncredited tax prepayments and regular tax (if regular tax greater than minimum tax then pay regular tax). Prepayments of minimum tax treated as credit against subsequent taxes on realized capital gains. Minimum tax liability reduced to the extent minimum tax liability plus uncredited payments exceed two times the minimum tax rate times the amount by which taxpayer's wealth exceeds $100 million. (Minimum tax therefore fully phased in for taxpayers with wealth over $200 million).	Current rates; MTM gain or loss treated as long-term capital gain or loss regardless of holding period unless another Code provision treats as gain or loss from a non-capital transaction or as ordinary.
Taxpayer	All taxpayerswith wealth (assets minus liabilities) greater than $100 million.	Taxpayers with more than $100 million in annual income or more than $1 billion in assets for three consecutive years. An applicable taxpayer continues to be treated as such until the taxpayer's income and assets drop below one-half of the thresholds for three years. Can exempt up to $1 billion of tradable stock in a single corporation.

9 Note to marketing: could you please adjust the spacing in this chart? It seems all over the place in some areas. Also note I have expanded the chart to show all text (not sure why the proofers did not help us with that).

Illiquid Taxpayers	Tradable assets less than 20% of a taxpayer's wealth. Illiquid taxpayers can elect to include only unrealized gain in tradable assets in minimum tax base and pay deferral charge on realized non-tradable asset gains not to exceed 10% of unrealized gains.	Not addressed (gain on non-tradable assets subject to tax plus deferral charge only when sold).
Valuation	Tradable assets at year-end market value, non-tradable assets using greater of original or adjusted basis, last valuation event from investment, borrowing, or financial statements or other methods approved by the Secretary. Non-tradable asset values adjusted upward annually by five-year Treasury rate plus 2%. Potentially appealable through appraisal.	Tradable assets at market value, non-tradable assets (for purposes of determining "applicable" taxpayer status) using greater of original or adjusted basis, last valuation event from investment, borrowing, or financial statements.
Credits Upon Death	Single: net uncredited payments in excess of tax liability from gains at death refunded to estate. Married: uncredited payments transferred to spouse.	Not applicable.
Reporting	Annual reporting if a taxpayer's wealth is in excess of the threshold.	Not addressed.
Installment Payments	First year minimum tax payable over nine years, with subsequent years payable over five years.	Five years for initial mark-to-market gain.
Estimated Impact	Top one-hundredth of one percent of householders. Estimated to reduce deficit by $360 billion over ten years.	700 taxpayers. Raise "hundreds of billions" of dollars.

IRS Fact Sheet on Crowdfunding

In March 2022, the Internal Revenue Service ("IRS") released a fact sheet on crowdfunding – the method of soliciting contributions online in order to, for example, fund a new business venture or raise charitable contributions.[10]

First, the fact sheet provides general guidance on the tax treatment of money raised through crowdfunding campaigns. Not all contributions made to campaign organizers are included in gross income. For example, if a solicited contribution is made as a gift (i.e., without the contributor receiving or expecting to receive anything in return), such amounts are not includible in the organizer's gross income. However, if a contributor does have an expectation of something in return for their contribution (e.g., a right to buy a product in the future at a discount), then such amounts contributed would be includible in the organizer's gross income. The fact sheet also clarifies that if a crowdfunding organizer solicits funds on behalf of others, the portion of the funds further distributed to the persons for whom the campaign was formed are excluded from the organizer's gross income.

Next, the fact sheet includes guidance on certain information reporting requirements relating to distributions of money raised. Websites that host crowdfunding campaigns and/or their payment processors may have information reporting obligations on IRS Form 1099-K, Payment Card and Third-Party Network Transactions, if certain reporting thresholds are met. For calendar years 2021 and prior, the threshold requirements were met if gross payments exceeded $20,000 resulting from more than 200 transactions. However, for calendar years after 2021, the threshold has been reduced to gross payments that exceed $600 resulting from any number of transactions.

To the extent such reporting thresholds are met, and to the extent a crowdfunding website and/or its payment processor has an obligation to file a Form 1099-K with the IRS, the crowdfunding website and/or its payment processor would also have an obligation to furnish a copy of such return to the person receiving such distributions. Note that Form 1099-K reporting is not required to the extent solicited contributions are considered gifts.

Lastly, the fact sheet reminds crowdfunding organizers and any person that receives amounts from crowdfunding campaigns to keep records of all relevant facts and circumstances relating to the transfer of such funds for at least three years.

10 The fact sheet is available at https://www.irs.gov/newsroom/money-received-through-crowdfunding-may-be-taxable-taxpayers-should-understand-their-obligations-and-the-benefits-of-good-recordkeeping

IBOR Legislation and the Final Regulations

On March 15, 2022, President Biden signed the Adjustable Interest Rate (LIBOR) Act into law (the "LIBOR Act").[11] The LIBOR Act attempts to provide a uniform federal solution for transitioning legacy contracts that either lack or contain insufficient contractual provisions addressing the permanent cessation of LIBOR by providing for the transition from LIBOR to a replacement rate and avoiding related litigation. The LIBOR Act generally provides that a contract that contains no LIBOR fallback or contains provisions which do not contain a specific USD LIBOR replacement or identify a person to make a replacement will have LIBOR replaced with a rate based on the Secured Overnight Financing Rate as a matter of law on June 30, 2023 (along with certain related adjustments to the spread).[12]

This was all terribly exciting enactment for finance and capital markets lawyers. A previous version of the legislation included something for the tax guys, too. However, the tax provision proposed in the Senate legislation ultimately was dropped from the final legislation, apparently due to jurisdictional considerations.[13] Accordingly, U.S. federal income tax implications of the federal legislative solution are governed by recently released final Treasury regulations under Treas. Reg. section 1.1001-6, which generally provide broad relief from the potential U.S. federal income tax consequences of IBOR replacement for most contracts.

Although a legislative solution would (of course) be welcomed on the tax side, the good news is that replacements pursuant to the LIBOR Act ought not have difficulty fitting within the final regulations. Under the final regulations, assuming an IBOR being replaced is a rate that is a "discontinued IBOR" on the date of replacement (within the meaning of the regulations), as long as there are no payments made between the parties to a contract unrelated to IBOR replacement, a LIBOR replacement amendment is not generally considered to result in a deemed exchange for federal income tax purposes.[14] The exceptions to the blessing of the final regulations are all focused on the parties intending to transfer value in connection with an IBOR replacement. Since replacements under the LIBOR Act occur by default, there is no opportunity for the parties to a contract to transfer value. Accordingly, we'd expect amendments occurring to the LIBOR Act to fit within the final regulations (although, as usual, it is best practice for taxpayers to analyze their particular facts and circumstances to reach a conclusion).

11 The LIBOR Act was included in the Consolidated Appropriate Act, 2022, a copy of which is available at https://www.congress.gov/117/bills/hr2471/BILLS-117hr2471enr.pdf See pgs. 777-786.

12 For a detailed discussion of the LIBOR Act, see our Legal Update, available at https://www.mayerbrown.com/en/perspectives-events/publications/2022/04/a-deeper-dive-into-the-us-adjustable-interest-rate-libor-act

13 All section references herein are to the Internal Revenue Code of 1986, as amended (the "Code"). In the Senate, the Senate Finance Committee has jurisdiction over any bill that includes any changes to the Internal Revenue Code. Hence, had the tax provision been removed, the legislation would have been referred to the Senate Finance Committee, rather than the Senate Banking Committee, on which its sponsor and co-sponsors sit.

14 For a detailed discussion of the final IBOR replacement regulations, see our Legal Update, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/01/us-irs-releases-final-regulations-addressing-ibor-transition.pdf

Revocation of IRS REIT PLR

On February 4, 2022, the IRS released a private letter ruling partially revoking a 2013 private letter ruling and finding that certain lease payments to a real estate investment trust (a "REIT") were not "rents from real property" for purposes of sections 856(c)(2)(C) and 856(c)(3)(A) of Code.[15] The prior private letter ruling, PLR 201337007, addressed a REIT spin-off transaction and concluded that lease payments under a lease subject to certain escalation and other adjustments that were based on the lessee's revenue did not prevent the lease payments from being treated as "rents from real property" under the REIT gross income tests. PLR 202205001 states that the position revoked is no longer consistent with the current IRS view.

In the 2013 ruling, a REIT leased real property under leases that provided, in part, for fixed base rent, subject to an escalation provision and other adjustments. Specifically, each lease provided for an annual increase to base rent limited to the lesser of (i) a fixed percentage of the prior year's base rent or (ii) an amount (not less than zero) that, when added to the prior year's base rent, would result in a specified ratio of the lessee's adjusted revenue to the total of the prior year's rent (the "Escalation Provisions"). Further, whenever a property was removed from a lease covering multiple properties, some leases would reduce rent by an amount based on the relative adjusted revenue generated by the removed property as compared to the total adjusted revenue generated by all the properties subject to such lease (the "Other Adjustment Provisions"). Each lease defined "adjusted revenue" as the net revenue of the lessee minus expenses, other than interest expense, income tax expense, depreciation and amortization expense, rent expense and certain other expenses.

In the new ruling, the IRS concluded that amounts determined under the Escalation Provisions and Other Adjustment Provisions depend in part on the lessee's adjusted revenue, which is a measure of the income or profits from operating the property and not equivalent to receipts or sales. Rents generally qualify under the REIT income tests if they are determined based on gross receipts or sales, but not income or profits. Accordingly, PLR 202205001 states that amounts received or accrued under the leases do not qualify as rents from real property and are, therefore, not considered qualifying income for purposes of the REIT gross income tests.

The new ruling "grandfathered" the taxpayer's current leases, noting, however, the grandfather would not apply if the leases are modified to change either the amount of the base rent or the manner in which the base rent is calculated (including amendments to the Escalation Provision or the Other Adjustments Provision). The ruling also contains what appears to be a heavily negotiated set of exceptions to the bar on amendments.

PLR 202205001 revokes only the part of the prior ruling that deals with adjustments to base rent. It does not modify the portion of the prior ruling that concludes that the REIT's receipt of percentage rent payments will not disqualify the rents for purposes of the REIT gross income tests. The prior ruling specified that percentage rent is based on a percentage of "net revenues" from the leased

15 Private Letter Ruling 202205001 (2/4/2022).

property. Although net revenues were adjusted under the applicable lease for the retail value of certain services (defined as the "Promotional Allowance") and other adjustments were made for certain subtenants, the prior ruling noted that taxes and expenses were not deducted in calculating "net revenues", unlike "adjusted revenue" which was relevant for determining base rent.

PLR 202211008: Stock Not Participating Preferred

Summary

On March 3, 2022, the IRS published PLR 202211008,[16] ruling that that (i) dividends (including a penalty dividend for late payments) on certain non-voting preferred stock did not cause it to be treated as "participating in corporate growth to any significant extent" under Code section 1504(a)(4)(B) and (ii) a discount created by pairing the stock with warrants did not result in an "unreasonable redemption premium" under Code section 1504(a)(4)(C). Although not explicitly stated, the rulings paved the way for the taxpayer to treat the stock as "non-stock" for determining affiliation under the consolidated return rules.

Following, we briefly summarize the relevant provisions of the Code and analyze the facts and law that the IRS considered in PLR 202211008 for purposes of reaching its conclusion.

General Background

A consolidated return is a federal income tax return filed by an electing group of affiliated, includible corporations reporting the group's income tax liability, its alternative minimum tax liability, its personal holding company tax liability, and its accumulated earnings tax liability.

Code section 1504 defines the term "affiliated group" as one or more chains of includible corporations connected through stock ownership with a common parent corporation which is also an includible corporation, but only if: (i) the common parent owns directly stock meeting the requirements of section 1504(a)(2) in at least one other includible corporation; and (ii) stock meeting the requirements of section 1504(a)(2) in each of the includible corporations (except the common parent) is owned directly by one or more of the other includible corporations.

The term "stock" is not comprehensively defined for purposes of section 1504(a); instead, common law concepts control. Importantly, the term "stock" is less about the legal form of the instrument and more about the actual ownership rights provided under the instrument; thus, the equity in a non-stock and/or non-corporate entity, such as a non-stock membership association or a limited liability partnership that has elected to be regarded as corporation for federal income tax purposes, may be considered in testing for affiliation.

16 Private Letter Ruling 202211008, (03/18/2022).

Despite the breadth of equity instruments that are considered "stock" for purposes of determining affiliation, not all types of in-form stock instruments are treated as such when applying the rules section 1504. Particularly, under section 1504(a)(4), the term "stock" does not include an instrument possessing the following characteristics: (1) it is not entitled to vote; (2) it is limited and preferred as to dividends and does not participate in corporate growth to any significant extent; (3) it has redemption and liquidation rights not exceeding the issue price of such stock (except for a reasonable redemption or liquidation premium); and (3) it is not convertible into another class of stock.

PLR 202211008:

The ruling featured an affiliated group of corporations (the "Parent Group") that joined in the filing of a consolidated U.S. federal income tax return. As part of a proposed acquisition, the parent of the group ("Parent") would contribute cash into a newly formed limited liability company treated as a corporation for US federal income tax purposes ("Sub") in exchange for common shares. Investor (an unrelated party) or its affiliates would contribute money to Sub in exchange for voting units and non-voting units in Sub. Sub planned to use its cash to acquire the outstanding shares of Target.

Each voting unit in Sub consisted of one share of voting Preferred stock and one zero-strike warrant for the common stock of Sub. Each non-voting unit in Sub consisted of one share of non-voting preferred stock and one zero-strike warrant for the common stock of Sub. Holders of voting units or non-voting units could separately dispose of the shares of preferred stock and the warrants without restriction, and they were not economically compelled to keep units unseparated.[17] The ruling states that the warrants were treated as common stock for U.S. federal income tax purposes.

Parent wanted to include Sub and Target in its consolidated group. As a result, Parent's ownership of Sub's stock would satisfy the requirements of section 1504(a)(2) only if the non-voting preferred stock was not treated as "stock" pursuant to section 1504(a)(4). The non-voting preferred stock had the following relevant terms:

1. Stated Amount: The non-voting preferred stock has a total stated amount of $j. (Of the $j purchase price of the non-voting units, $k was be allocated to the non-voting preferred stock and $1 to the warrants.)[18]
2. Dividend Rate: Dividends accrued at a rate of m% of the stated amount per year, paid quarterly. If the dividends were not paid on time, they accrued at the higher rate of n%.
3. Voting: The non-voting preferred stock had no voting rights.

17 This statement mimics the language in Rev. Rul. 2003-97, I.R.B. 2003-34 (July 23, 2003), dealing with stock plus forward units where the components could be separated.

18 This is not $1, it is the IRS's way of redacting the amount.

4. Term: The non-voting preferred stock had a perpetual term. It had to be redeemed before Sub was liquidated.

5. Sub's Redemption Rights: Sub may redeem the non-voting preferred stock at any time for the stated amount.

6. Holder's Redemption Rights: The holder of the non-voting preferred stock could compel a redemption, but o years after issuance, the holder could compel an initial public offering of Sub's stock or a sale of substantially all of Sub's assets.

The IRS ruled, in respect of the non-voting preferred stock, that: (1) its dividends payable do not cause it to be treated as participating in corporate growth to any "significant extent" within the meaning of §1504(a)(4)(B); and (2) the excess of its stated amount over its acquisition price did not constitute an unreasonable redemption premium within the meaning of §1504(a)(4)(C). Importantly, the taxpayer had to represent that the non-voting preferred stock and warrants were separate instruments for federal income tax purposes.

BATS Global Markets Holdings, Inc. and Subsidiaries v. Commissioner

On March 31, 2022, in *BATS Global Markets Holdings, Inc. v. Commissioner*, 158 T.C. No. 5, the United States Tax Court ruled against an operator of national securities exchanges that sought to treat fees from customers participating in the exchanges as "domestic production gross receipts" for purposes of Section 199 of the Code.

The taxpayer, together with its affiliates, developed trading platform software for trading equity securities in the United States and Europe, operating two marketplaces for equities as well as a marketplace for trading equity options. Customers were charged three types of fees:

1. Logical port fees – Customers paid fixed monthly fees for connectivity to the taxpayer's markets, with a fixed fee for each "logical port".

2. Routing fees – Customers paid fees when orders that had been routed to other exchanges or trading venues were executed.

3. Transaction fees – The primary source of the taxpayer's revenues were fees imposed on buy and sell orders, with a fee and rebate structure designed to incentivize customers to add liquidity. Specifically, fees were imposed on customers who removed liquidity from the market by entering buy and sell orders that were immediately executed, and rebates were issued to customers who added liquidity by entering buy and sell orders that weren't immediately executable when placed on the order book. The objective of these fees was to maintain healthy liquidity by enhancing the number and price range of orders on the exchanges' order books.

Section 199 of the Code, enacted as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357 and repealed by the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, provided a tax deduction for certain domestic production activities. This provision was equal to 9% of the lesser of (1) the qualified production activities income of the taxpayer for a tax year and (2) the taxpayer's taxable income (without regard to Section 199) for the taxable year. "Qualified production activities income" was defined as the excess of "domestic production gross receipts" over related cost of goods sold and other related expenses, losses, and deductions (other than under Section 199).

Domestic production gross receipts included gross receipts from any lease, rental, license, sale, exchange, or other disposition of qualifying production property manufactured or produced in the United States (including computer software). Receipts from services were generally excluded. However, Treas. Reg. section 1.199-3(i)(6)(iii) allowed gross receipts from providing customers access to computer software to be treated as derived from the disposition of computer software (and therefore qualify as "domestic production gross receipts"). But this exception would only apply if the software was provided for the customers' direct use and if either a "self-comparable" exception (not applicable here) or a "third-party comparable" exception applied. The "third-party comparable" exception applied if another person derived receipts from the disposition, in a tangible medium or by download, of substantially identical software to its customers.

The Tax Court first rejected the argument that any of the fees qualified as being derived from providing customers with direct access to its software. In the case of the logical port fees, the Tax Court concluded that these fees were payments for access to the taxpayer's private communications network, rather than for access to software, analogizing the service to an example in Treas. Reg. section 1.199-3(i)(6)(v) of providing telephone, voicemail, and email services. As a fee for communication services, the logical port fee would not qualify as domestic production gross receipts. In the case of the routing fees, the court concluded that the fees were charged for routing and trade execution services, and not for the customers' direct use of the software. Regarding transaction fees, the court similarly concluded that the fees were for provision of trade execution services, and not direct use of the software. In its analysis of the fees, the court rejected a comparison to Intuit's TurboTax, which consists of software that allows customers to prepare their own tax returns.

Finally, the Tax Court also concluded that even if the taxpayer were providing customers with direct access to its software, the "third-party comparable" exception would not apply despite the existence of commercially available trading software offered by other vendors. Unlike the other trading software vendors cited (NYSE Euronext, Cinnober, and MillenniumIT), the taxpayer did not enter into license agreements for the use of its software by customers and did not give its customers the ability to operate their own electronic markets. The court indicated that trading securities and operating a securities exchange were two distinct activities and not the same from the customer's perspective. Thus, the other vendors' software was not substantially identical to the taxpayer's software.

California Proposes 'Extreme Wealth' Net Worth Tax

On February 16, 2022, a California state Assembly member proposed Assembly Bill 2289 within the California Legislature. The bill would result in a new annual wealth tax on the state's wealthiest, similar to the federal Ultra-Millionaire Tax Act proposed by Senator Elizabeth Warren in 2021. Beginning in 2023, the tax would impose a 1.5% annual tax on those with a worldwide net worth of $1 billion (or $500 million if married filing jointly). In 2025, the tax would be expanded to include a 1% annual tax on those with a worldwide net worth of $50 million (or $25 million if married filing jointly). The new tax would be in addition to California's 13.3% state income tax (which could increase to 14.3% with the passage of Assembly Bill 1253). Therefore, the proposed tax would tax all wealth, whether the wealth has been realized as income or not. Worldwide net worth would be described by the bill with reference to specific federal provisions and would provide that worldwide net worth does not include specific assets, including personal property situated outside of California, directly held real property, or liabilities related to directly held real property.

Similar laws were proposed in California in both 2020 and 2021, but ultimately failed to pass the Legislature. If the proposed net worth tax passes in the Legislature this time around, it would still need to go to voters for approval in 2022. This is because the proposed change would require a constitutional amendment to increase California's current wealth tax limit or 0.4%. Ultimately, it is estimated the bill would impact the top 0.07% of the richest families, or about 15,000 households, while raising estimated revenues of about $22.3 billion per year. California currently expects to have a $97.5 billion budget surplus.[19]

Notice 2022-23: Proposed Updates to Qualified Intermediary Agreement

On May 3, 2022, the IRS released Notice 2022-23 (the "Notice") which proposes changes to the Qualified Intermediary ("QI") Agreement that will permit a QI to assume withholding and reporting responsibilities for purposes of Code sections 1446(a) and (f), and apply to a QI receiving a distribution made by a publicly traded partnership ("PTP") on behalf of an account holder of the QI or a QI effecting a transfer of an interest in a PTP, respectively. The Notice provides that the proposed changes, subject to any modifications based on public comments received and accepted, will be incorporated into an upcoming final QI Agreement that will apply to QI agreements that are in effect on or after January 1, 2023.

For a detailed summary of the Notice, see our Legal Update, available at https://www.mayerbrown.com/en/perspectives-events/publications/2022/05/qi-agreement-us-irs-proposes-modifications-to-rules-for-distributions-by-ptps-and-transfers-of-ptp-interests.

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19 See Shawn Hubler, California Expects a Record Budget Surplus of Nearly $100 Billion. *The New York Times* (May 13, 2022), available at https://www.nytimes.com/2022/05/13/us/california-budget-surplus.html

In the News

WHAT'S NEW?

Broker-dealer lawyer Steffen Hemmerich joins Mayer Brown, *1/25/2022*
Steffen Hemmerich has joined the firm as a partner in its New York office as a member of the firm's Financial Services Regulatory & Enforcement practice. His practice focuses on advising domestic and international investment banks and financial institutions on broker-dealer regulatory and transactional matters. He also advises financial services firms and fintech companies on securities and broker-dealer regulatory matters relating to digital assets and blockchain technology.

Mayer Brown Launches Salt Lake City Office, *1/24/2022*
Mayer Brown's newest office has opened in Salt Lake City, Utah. The new office bolsters the firm's offerings to the technology and investment communities in Utah and beyond, initially by adding several experienced attorneys who join from a local firm. Mayer Brown fosters longstanding relationships with founders and entrepreneurs, taking companies through each stage of growth. "Our clients trust Mayer Brown to provide ongoing public company and corporate governance advice, well beyond their IPOs," said Jennifer Carlson, partner in Mayer Brown's Northern California offices, who has relocated her Capital Markets practice to Salt Lake City.

Mayer Brown strengthens debt capital markets team in London with addition of partner, Peter Pears, 1*/4/2022*
Peter acts for issuers and underwriters on a range of domestic and international capital markets offerings, including Eurobond, medium term note, commercial paper, regulatory capital, corporate hybrid and liability management transactions. His clients include financial institutions, major corporations, sovereigns, municipalities and supranationals across Africa, Asia, Europe, and the United States. Peter has considerable experience in sustainable debt and ESG principles and regularly advises on green, social and sustainable bonds, sustainability-linked bonds, and ESG regulatory matters.

RECENT RECOGNITION

Andrew Olmem named among "Washington's Most Influential People" by Washingtonian, *5/2/2022*
Mayer Brown partner Andrew Olmem has been named to *Washingtonian's* 2022 list of "Washington's Most Influential People" in the Banking & Finance category. The list recognizes Washington DC experts and advocates in the private sector who influence policymaking in the public sector.

Mayer Brown advised on a GTR Best Deals 2022 winner, *4/25/2022*
Mayer Brown is proud to have advised a group of lenders on the negotiation, structuring, and execution of a multi-jurisdictional debt restructuring for the Brazilian sugar and ethanol producer Biosev, which was named one of Global Trade Review's (GTR) Best Deals 2022. A cross-practice team of Mayer Brown lawyers advised ABN AMRO Bank N.V, BNP Paribas, Crédit Agricole Corporate and Investment Bank, ING Bank N.V., Natixis New York Branch, Cooperative Rabobank U.A., and Société

Générale on the consensual restructuring of approximately US$1.4 billion of debt, previously owed by Biosev.

Mayer Brown partner Stephanie Hurst named to *Los Angeles Business Journal* 2022 list of influential attorneys, *4/18/2022*
Los Angeles-based Corporate & Securities partner Stephanie Hurst has been named to the *Los Angeles Business Journal's* 2022 "Women of Influence: Attorneys" list, which highlights women lawyers for their exceptional legal skill and achievement across the full spectrum of responsibility, exemplary leadership and contributions to the Los Angeles community.

Five Mayer Brown partners recognized as 2022 "Women Leaders" by *IFLR1000*, *3/31/2022*
Five Mayer Brown partners were named to *IFLR1000* Women Leaders 2022, four in the Americas guide and one in the Asia-Pacific edition, including Anna Pinedo, Julie Gillespie, Hannah Ha, and Elizabeth Raymond. *IFLR1000* Women Leaders recognizes leading female transactional lawyers globally with impressive track records who have been consistently recommended by clients and peers for the quality of their advice and service.

Tax partner Mark Leeds named to Opportunity Zone's Top 25 Tax Specialists 2021 list, *2/11/2022*

Four Mayer Brown practices named 2021 Practice Groups of the Year by *Law360*, *3/28/2022*
Four Mayer Brown practice groups are recognized as 2021 "Practice Group of the Year" by *Law360* for achievements in the Banking, Benefits, Environmental, and Structured Finance categories.

RECENT SPEAKING ENGAGEMENTS

Upcoming – Preparing to Be a Public Company: Reporting Requirements | Among the various considerations for companies seeking to go public, companies should understand the significant public reporting requirements created by the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the associated rules and regulations. During this session hosted by *Intelligize* on May 25, Mayer Brown partners John Ablan and David Freed will discuss triggers for deeming a company "public" and thus subject to the Exchange Act's reporting requirements; tests for determining filer status and implications; an overview of information required in periodic reports on Forms 10-K, 10-Q, and 8-K; officer certification requirements under the Sarbanes-Oxley Act of 2002; legal principles relating to the concept of "materiality"; Regulation FD; and requirements for Insiders (Section 16).

Upcoming – Annual Pacific Rim Tax Conference | Mayer Brown partner Gary Wilcox will participate in a discussion on "Restructuring and Reacting to International, BEPS, and Domestic Tax Law Changes" at the Eleventh Annual Pacific Rim Tax Conference. The two-day conference will bring international tax policy and management issues to the forefront of corporate tax leaders and tax professionals, focusing on the Pacific Rim arena.

Upcoming – FRA Private Investment Fund Tax Master Class | Mark Leeds will speak on "Offshore Lenders: Loan Origination Essentials Not to Be Missed" at the FRA Private Investment Fund Tax Master Class. The two-day event will be held at The University Club of New York in New York City, NY. *Visit the event site*.

Puerto Rico Act 60 Tax Exemptions Webinar | Mark Leeds and Juan Lopez Valek will speak on "Puerto Rico Act 60 Tax Exemptions: IRS Examination and Audits, Key Issues for Individual and Business Taxpayer" during the Strafford webinar on May 17. *Register here for the May 17, 2022 session*.

Liability Management Transactions | 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. During this session hosted by the *Practising Law Institute*, Mayer Brown partners, John Ablan and John Berkery, addressed an overview of liability management options and objectives; redemptions; open market repurchases; debt tender offers; no-action letter relief for non-convertible debt securities; five business day tender offer no-action letter; exchange offers; and consent solicitations.

US Securities & Exchange Commission's Small Business Capital Formation Advisory Committee Meeting | During its September 2021 meeting, the US Securities & Exchange Commission's (SEC) Small Business Capital Formation Advisory Committee discussed different pathways for businesses to go public, including mergers with special purpose acquisition companies (SPACs). On March 30, 2022, the Commission proposed rules on SPACs, shell companies, and projections, which would require, among other things, additional disclosures about SPAC sponsors, conflicts of interest, and sources of dilution. This press release includes a fact sheet highlighting the areas covered by the proposed rules. Staff from the SEC's Division of Corporation Finance will provide an overview of the proposed SPAC rules, and then the Committee will hear from Mayer Brown partner, Anna Pinedo, who advises companies in financing transactions on implications and impacts the proposed rules may have on small businesses if finalized.

MyStockOptions.com Webinar - Strategies For Concentrated Positions In Company Stock | Mayer Brown partner Mark Leeds took part on a panel discussing "Strategies For Concentrated Positions In Company Stock" hosted by myStockOptions.com on May 4. The webinar also highlighted the importance of understanding strategies available for managing wealth and preventing wealth loss in concentrated company stock holdings in order to meet clients' financial goals.

87th Annual API Federal Tax Forum | On May 3-4, 2022, The *American Petroleum Institute* hosted its 87th Annual Federal Tax Forum where panelists discussed federal oil and gas taxation. Mayer Brown partner Dan Kiely spoke on "The Energy Transition – Structuring, Financing, and the Evolving Credit Landscape."

Convertible Bonds | For many issuers, convertible bonds continue to be among the most popular financing tools, and for good reason. During this session, Mayer Brown partners, Ryan Castillo and

Remmelt Reigersman, as well as Raymond James' Co-head of Equity-Linked Securities, Claude DeSouza-Lawrence, and Director of Equity-Linked Securities, Peter Pergola, discussed the state of the market, as well as a convertible bond overview; simplified accounting treatment for issuers; accompanying antidilutive strategies, including capped call and call/warrant structures; tax considerations for issuers; addressing busted converts; and other securities and disclosure considerations.

A Sea Change Set of New Rules: The SEC's Proposed Rules Applicable to SPACs | On March 30, 2022, SEC proposed new rules and amendments to existing rules and forms (the "Proposed Rules") addressing the treatment of SPACs in connection with their initial public offerings ("IPOs") and subsequent de-SPAC transactions. The Proposed Rules, if adopted, would represent a sea change in the treatment of SPACs by the SEC. If the Proposed Rules were to be adopted in the form in which they've been put forward, it is also worth noting that they reflect a number of fundamental changes to basic principles of securities liability that extend in their application beyond SPACs and de-SPACs. During this session hosted by the *Practising Law Institute,* Mayer Brown partners, John Ablan and Anna Pinedo, reviewed the SEC's Proposal and its implications for market participants. They addressed conflicts of interest, dilution, and fairness disclosures in connection with SPAC transactions; fairness opinions, and the MultiPlan decision; alignment of disclosures for de-SPAC transactions with those for traditional IPOs; enhanced projections disclosures; proposed safe harbor under the Investment Company Act of 1940; underwriter liability; and other key takeaways and practical considerations.

SEC & FASB Developments | During this session focusing on recent developments and trends with the SEC, panelists Ryan Castillo and Anna Pinedo, partners at Mayer Brown, joined by Polia Nair, Assurance Partner at CohnReznick, covered the Holding Foreign Companies Accountable Act, Disclosure and Implementation by the SEC and the PCAOB; SEC amendments to Form 10-K, including an overview of new Item 9C of the Holding Foreign Companies Accountable Act and data tagging, and disclosure practices; Filing Fee Disclosure, and Payment Methods Modernization; Universal Proxy; SEC Staff Comments on key performance indicators and non-GAAP financial measures, and enforcement actions; Climate Change Disclosures; the SEC's proposal on cybersecurity disclosures; the SEC's proposal on beneficial ownership reporting; and the SEC's proposal on shortening the securities transaction settlement cycle.

The SPAC Life Cycle: Business, Legal and Accounting Considerations Forum 2022 | The *Practising Law Institute* hosted a hybrid program which provided a comprehensive examination of special purpose acquisition companies (SPACs) and the various business, legal, SEC reporting, and accounting considerations that must be addressed in each phase of the SPAC's life cycle. Mayer Brown partner Eddie Best was Chairperson of the program and delivered presentations as part of two separate panels, "On-Going Reporting and the Search for a Target" and "The De-SPACing Transaction."

Private Placements and Hybrid Securities Offerings 2022 | The *Practising Law Institute* hosted a two-day, hybrid program from March 31 – April 1, 2022. The program, chaired by Mayer Brown partner, Anna Pinedo, covered the basics of private placements, resales of restricted securities, Section 4(a)(1-

1/2) transactions, and block trades. The program had a surrounding focus on documentation, principal negotiating issues, and market developments relating to late-stage or pre-IPO private placements, PIPE transactions, 4(a)(2) and Rule 144A offerings, and confidentially marketed public offerings. Anna Pinedo delivered the program's opening remarks for both days, and Mayer Brown partner, Brian Hirshberg participated on two panels: "Resales of Restricted Securities; Secondary Sales of Securities of Privately Held Companies" and "Undertaking a Private Transaction."

Climate Change Disclosure: SEC's Proposed New Rules & Impact on Public Companies | On March 21, 2022, the SEC voted to propose rules that would require extensive reporting by public companies of climate change-related disclosure and related attestation, if adopted. In a departure from existing "principles-based" disclosure requirements rooted in materiality, the SEC proposed rules that are prescriptive and intended to provide investors with consistent and comparable data, despite recent evidence that a significant majority of companies questioned by SEC Staff currently do not find climate change-related physical or transition risks to be material to their businesses. During this session hosted by *Intelligize*, Mayer Brown lawyers discussed the proposal and its impact on public companies, including an overview and background of the proposed new rules; proposed changes to Regulation S-X affecting financial statement disclosures; proposed changes to Regulation S-K affecting non-financial statement disclosures; proposed scope and phase-in periods; and practical considerations for public companies.

TEI 72nd Midyear Conference | During this session hosted by the *Tax Executives Institute* on March 20-23, 2022, Mayer Brown partners, Brian Kittle, Mike Lebovitz, Russell Nance, Leah Robinson, Amanda Rosenberg and Scott Stewart, participated in TEI's fully hybrid 72nd Midyear Conference entitled "Tax Reform Redux: Seizing Opportunities and Mitigating Risks." Key topics addressed by Mayer Brown partners included: "Alarming Trends in Penalty Assertions: When Did Penalties Become Their Own Substantive Issue?"; "It's All About Substance: Revisiting DEMPE and Related Substance Requirements in a Pillar Two/BBBA World"; "Managing the Discontinuation of LIBOR from a Tax Perspective – Important Technical and Practical Considerations"; "State Responses to Federal Tax Reform: Developing Audit Issues and Litigation"; "The Emerging Tax Landscape for Alternative Energy & ESG Investments"; and "OECD Pillars 1 & 2: Where do we Stand?"

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VOLUME 05, ISSUE 01 | May 23, 2022

Contacts

Steven Garden
Chicago
+1 312 701 7830
sgarden@mayerbrown.com

Remmelt Reigersman
Northern California
+1 415 874 4259
rreigersman@mayerbrown.com

George Haines
Chicago
+1 312 701 8775
ghaines@mayerbrown.com

Stephanie Wood
New York
+1 212 506 2504
swood@mayerbrown.com

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

Kelly Donigan
Washington DC
+1 202 263 3387
kdonigan@mayerbrown.com

Juan Lopez Valek
New York
+1 212 506 2471
jlopezvalek@mayerbrown.com

Brennan Young
Charlotte
+1 704 444 3558
byoung@mayerbrown.com

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

Nicholas Flatley
Chicago
+1 312 701 8231
nflatley@mayerbrown.com

Amit Neuman
New York
+1 212 506 2263
aneuman@mayerbrown.com