Alphabet Soup: MLPs, upREITs and up-Cs

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1. Presentation
2. Federal Tax Practice
3. Proposed Regulations Clarify the Definition of “Real Property” Under the REIT Rules
4. Tax Talk: Volume 7, Issue 1
5. Attorney Biographies:
   Thomas Humphreys
   Remmelt Reigersman
Alphabet Soup: MLPs, UpREITs and Up-Cs

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May 20, 2014
Agenda

• Overview
• Up-Cs
• REIT Conversions
• Optimized MLPs
• Tax Reform?
Overview: Primer on Tax Pass-Thrus

- Corporations subject to 35% federal income tax; shareholders subject to tax on dividends received at 39.6% maximum rate (20% for “qualified dividends”)

- The U.S. Internal Revenue Code creates various pass-thru entities:
  - Partnerships (general partnerships, limited partnerships or limited liability companies under state law) that are not publicly traded
  - Publicly traded partnerships that engage in certain activities such as oil and gas production
  - Real estate investment trusts (“REIT”s)—corporations for tax purposes that hold mostly real estate assets like real estate or mortgages and have mostly passive income
Common Theme

• Taxpayers will gravitate over time to structures that optimize the different entity taxation regimes

• They will use tax pass-thrus to the extent possible, with only those activities that must be in corporate solution in corporations
Up-C
• The Up-C structure has become increasingly common for IPOs of companies that have historically operated as partnerships.

• The Up-C structure derives its name from the UPREIT structure. Essentially, a newly formed corporation ("PubCo") will be the entity that undertakes the IPO. PubCo will sit above an existing limited liability company (the "LLC").
PubCo will be a holding company and will have as its subsidiary the LLC. The principal assets/operating business will continue to be at (or below) the LLC level.

PubCo will receive the IPO proceeds and downstream the proceeds to the LLC.
Typical Pre-IPO Structure - Corporation

Disadvantages

- Income from operating subsidiaries subject to entity-level tax when earned by the corporation
- Historic partners (and other shareholders) subject to tax when they receive dividends
Typical Pre-IPO Structure - Partnership

**Advantage**
- Partnership not subject to tax; income earned by operating subsidiaries taxable directly to partners

**Disadvantage**
- Listing partnership when going public may result in the partnership being taxed as a corporation
Up-C Structure: Immediately After Formation of C-Corp

Company incorporated in Delaware with two classes of common stock, Class A and Class B. Class A is offered in the IPO and Class B is held by the Historic Partners and provides no economic rights, only voting rights.
Up-C Structure: Immediately following IPO

Public Shareholders*
(Class A Holders)

- 100% economic interest
- Minority voting interest

Historic Partners

- Voting interest
- 100% economic interest

PubCo (Delaware C-Corp)

LLC

* Public shareholders purchase their shares for cash in the IPO
Up-C Structure: Final Structure

- Class A Holders
  - 100% economic interest
  - 40% voting interest

- Historic Partners
  - 60% voting interest
  - 60% economic interest

- PubCo (Delaware C-Corp)
  - 40% economic interest
  - Sole managing member

- LLC
  - LLC interests convertible into shares of Class A common stock

- PubCo uses the proceeds received in the IPO to purchase LLC interests
- LLC redeems partnership interests from the Historic Partners (treated for tax purposes as a “disguised sale” or direct purchase of partnership interests by PubCo from the Historic Partners)

(Percentages are included only for illustrative purposes)
Why an Up-C structure?

• Prior to the IPO, the business was conducted through an LLC, which is a pass-through structure and does not pay entity-level taxes

• Through the Up-C structure, the pass-through structure remains in place and PubCo pays the pre-IPO equity holders (LLC members) for the value of PubCo’s tax attributes as those tax attributes are used after the IPO. This creates a market dynamic that permits value to be extracted from PubCo after the IPO, without decreasing the value of PubCo in the offering
Why an Up-C structure (cont.)?

• To effectuate the Up-C structure, PubCo will enter into various arrangements with the LLC and its members. These include an LLC operating agreement and Tax Receivable Agreement ("TRA"). Generally, TRAs do not appear to impact the valuation of a corporation in its IPO.
Why an Up-C structure (cont.)?

- Public stockholders often do not assign full value to the tax attributes of a corporation. Similarly, public stockholders apparently do not discount the value of a corporation to account fully for future payments to be made under a TRA. Through the TRA, the IPO corporation pays for a valuable tax attribute (for example, a basis step-up)
Tax Receivable Agreements

- **PubCo (Delaware C-Corp)**
  - 40% economic interest
  - Sole managing member

- **Historic Partners**
  - 60% economic interest

- **LLC**
  - LLC interests convertible into shares of Class A common stock

(percentages are included only for illustrative purposes)
Benefits of the Tax Receivable Agreement

- Because the historic partners sell partnership interests to PubCo (rather than stock, as in a traditional IPO structure), PubCo receives a “step-up” in the tax basis of its assets.

- This tax basis step-up is allocated to PubCo’s share of the historic partnership’s assets, and in many cases the step-up is primarily allocable to intangible assets that are amortizable on a straight-line basis over 15 years (so-called “Section 197” intangibles).

- Through a TRA the historic partners effectively capture the majority of the value associated with the PubCo’s tax basis step-up.
Benefits of the Tax Receivable Agreement (cont.)

- Under the terms of the TRA, PubCo is obligated to pay the historic partners in cash an amount equal to PubCo’s tax savings generated by the tax basis step-up (typically 85% of such savings)

- Payments under the TRA are effectively treated as additional purchase price paid by PubCo for its interest in the historic partnership
Benefits of the Tax Receivable Agreement (cont.)

Illustration of Potential TRA Economics

- Amount of PubCo Tax Basis Step-Up* $300 million
- Amortization Period 15 years
- Annual Amortization $20 million
- PubCo Tax Rate (Federal & State) 40%
- PubCo Annual Savings $8 million
- TRA Payout Ratio 85%
- Annual Payment to Historic Partners** $6.8 million
- Total Payments to Historic Partners $102 million

*Any future exchanges of partnership units for Class A shares of PubCo also may give rise to additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time)

**Payments under the TRA also give rise to additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time)
Additional Considerations Related to Up-C Structure

• The Up-C structure maintains continuing pass-through treatment (single level taxation) for the historic partners with respect to their proportionate share of net income realized by the partnership

• The historic partners obtain liquidity through the right to exchange partnership units for Class A shares of PubCo

• The Up-C structure provides a range of options for making strategic acquisitions and compensating employees (e.g., PubCo stock, PubCo options, and partnership units)
• PubCo becomes the managing member of the historic partnership and the historic partners retain voting control through Class B PubCo shares

• PubCo consolidates the historic partnership for financial statement purposes
Miscellaneous Issues Related to Up-C Structure

- “Anti-churning rules” under Section 197 of the Internal Revenue Code

- Tax distributions to PubCo and historic partners

- Continuing administration of TRA and determination of annual payments to be made by PubCo to historic partners (reviewed and approved by PubCo audit committee in conjunction with outside advisors)

- Investment Company Act (“40 Act”) status of PubCo
REIT Conversions
REIT Conversions

- Penn National Gaming
- CBS Outdoor
• Goal: separate the real estate from the operating assets and allow real estate to trade separately, achieving a higher valuation multiple for those assets.
Related Party Rents

• Rent paid to a REIT is not “qualifying” if REIT owns 10% or more of tenant

• Attribution rules: if a shareholder owns 10% or more of both REIT and tenant then REIT considered to own 10% of tenant
Penn National Gaming (cont.)

Carlino Family       Public

Exchange PENN Shares (to bring Family below 10%)
Penn National Gaming (cont.)

Public/Family

Tax Free Spin-off

100%

PENN

Gaming and Leisure Properties, Inc. ("GLPI") REIT

Operating Assets
Penn National Gaming (cont.)

- Distribution of GLPI stock is tax free
- Restrictions on PENN and GLPI stock sales post spin-off
- IRS private letter ruling confirms tax treatment
CBS Outdoor

CBS Corporation

CBS Outdoor Americas Inc. REIT

Public

83% Tax Free Split-off

17% IPO
CBS Outdoor (cont.)

Public
(former CBS shareholders that have elected to take REIT shares and give up their CBS shares)

Public

CBS Outdoor Americas Inc.
REIT
Real Estate (outdoor ad displays)

CBS

Lease
Rent
Optimized MLPs
MLP Basics

• In 1987 Congress passed IRC section 7704 which treats a “publicly traded partnership” as a corporation for federal income tax purposes.
• The exceptions to the rule were substantial, however.
• A partnership with 90% or more qualifying income for the taxable year was excepted and, therefore, treated as a corporation.
• Qualifying income includes the normal types of passive income including interest, dividends, rents, etc.
• However, income from natural resources was also included.
MLP Basics (cont.)

• Broad definition of natural resource income: “income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber), industrial source carbon dioxide, or the transportation or storage of any fuel described in subsection (b), (c), (d), or (e) of section 6426, or any alcohol fuel defined in section 6426(b)(4)(A) or any biodiesel fuel as defined in section 40A(d)(1).”
## MLP Basics (cont.)

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<tr>
<th>Issuer</th>
<th>Business Description</th>
<th>Offer Date</th>
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<tr>
<td>Enable Midstream Partners, LP</td>
<td>Develops natural gas &amp; crude oil assets</td>
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<td>Cypress Energy Partners, L.P.</td>
<td>Provides saltwater disposal &amp; environmental services</td>
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<tr>
<td>Valero Energy Partners LP</td>
<td>Owns &amp; operates pipelines &amp; transportation assets</td>
<td>12/10/2013</td>
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<td>Midcoast Energy Partners, L.P.</td>
<td>Natural gas and natural gas liquids (NGL) midstream business</td>
<td>11/6/2013</td>
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<tr>
<td>Arc Logistics Partners LP</td>
<td>Develops &amp; acquires energy logistics assets</td>
<td>11/5/2013</td>
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Optimized MLPs

Public (Tax Exempts/non-U.S.)

C Corp ("blocker")

Public (U.S.)

MLP
Hiatus in MLP Rulings – March 2014

- Why?

- When will it end?
Takeaways

• Continued expansion of UP-C structure and C Corp/MLP structures
• Real estate intensive businesses will continue to attempt to unlock value through REIT conversions and spin-offs
Tax Reform?
Tax Reform?

- Rep. Dave Camp (R-MI) has released a “discussion draft” of tax reform draft legislation
- No legislation has been introduced
- No hearings have been held on the discussion draft
Tax Reform?

- Pass-Thru and Certain Other Entities
  - Publicly traded partnership exception restricted to mining and natural resources partnerships
  - Prevention of tax-free spinoffs involving REITs
  - Certain short-life property not treated as real property for purposes of REIT provisions
  - Repeal of special rules for timber held by REITs
  - Non-REIT earnings and profits required to be distributed by REIT in cash
• Tax Reform?

• Pass-Thru and Certain Other Entities
  • Debt instruments of publicly offered REITs and mortgages treated as real estate assets
  • Reduction in percentage limitation (to 20% from 25%) on assets of REIT which may be taxable REIT subsidiaries
  • Recognition of net built-in gain on assets when a C corporation converts to a REIT or RIC, or when a REIT or RIC acquires assets from a C corporation in a carryover basis transaction
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To ensure compliance with requirements imposed by the IRS, Morrison & Foerster LLP informs you that, if any advice concerning one or more U.S. Federal tax issues is contained in this communication (including any attachments), such advice is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.
Federal Tax Practice

The Federal Tax Practice has over 30 attorneys providing tax advice to the firm’s worldwide clients. Our practice encompasses nearly all substantive areas of federal tax law in the context of structuring transactions and business enterprises, tax planning and consulting, and representing clients in tax litigation.

Corporate Transactions/Mergers and Acquisitions

In conjunction with the firm’s Corporate and Finance Department lawyers, we represent both domestic and international corporations in structuring and implementing both taxable and tax-free acquisitions and dispositions of stock and assets of public and private companies. Our attorneys also regularly provide advice with respect to corporate finance transactions, in both a domestic and a cross-border context, including private and public offerings of debt and equity securities and financial products. We advise corporations and private equity funds in connection with strategic and venture capital investments, leveraged recapitalizations and management buyouts. We have significant expertise in tax planning for start-ups and early-stage companies, particularly new media and high-technology companies, including choice of entity, conversions from limited liability companies to corporations, technology licensing, joint ventures and strategic alliances, and financing and going-public transactions. We have substantial expertise with respect to tax concerns arising from corporate restructurings, including tax issues posed by bankruptcy and non-bankruptcy workouts, such as planning to minimize cancellation of indebtedness income and maximize preservation of net operating losses and other tax attributes and structuring reorganizations of distressed companies on a tax-free basis. We regularly advise clients on corporate operational issues, including consolidated return issues, tax accounting issues and tax disclosure issues.

U.S. Taxation of Multinational Corporations

We advise U.S. corporations in connection with their foreign activities and foreign corporations in connection with their U.S. activities. Our advice includes structuring acquisitions, dispositions, joint ventures and strategic alliances. Where necessary, we work with local tax advisors to determine optimal structures. We are expert in the special tax considerations that apply to U.S. persons holding interests in foreign entities, including the rules applicable to controlled foreign corporations and passive foreign investment companies. We regularly assist clients in developing and implementing agreements relating to the cross-border sales of tangible and intangible property, and in the sale, licensing and development of intangible property. We have significant experience advising foreign-based corporations and investors regarding inbound
investments in the U.S., including through the establishment of branches or subsidiaries, acquisitions of existing businesses, and through the formation of joint ventures and strategic alliances with U.S.-based corporations and venture capital investments.

**Partnership Taxation**

We have expertise with respect to the full range of non-corporate entities classified as partnerships for tax purposes, including general and limited partnerships, limited liability companies (LLCs) and business trusts, as well as the use of disregarded entities in a wide variety of tax planning situations. Our activities encompass a broad range of business transactions, including domestic and offshore investment partnerships, private equity funds and exchange funds and partnerships or LLCs formed to conduct operating businesses. We have significant experience in partnership/LLC roll-ups and restructurings, including divisions and combinations and redemptions of partnership/LLC interests, and including restructurings in connection with loan workouts, in both a bankruptcy and a non-bankruptcy context. We regularly deal with specialized tax problems of non-corporate entities, including income and loss allocations and withholding tax issues that arise for partnerships/LLCs with tax-exempt or foreign partners, disguised sales and built-in gains issues that arise when appreciated property is contributed to, or distributed by, a partnership/LLC, and problems relating to allocation of liabilities for basis purposes, including in loan workout situations.

**Real Estate Taxation**

We assist clients with respect to the full range of real estate acquisitions, dispositions and tax-deferred exchanges, including complex multi-party and multi-property exchanges and non-simultaneous and reverse exchanges, real estate leasing, real estate development and financing transactions. We provide advice with respect to the tax implications of real estate joint ventures and syndications, pension investments in real estate, convertible and participating mortgage transactions and rehabilitation and low-income housing credit transactions.

**Other Specialized Entities and Financial Transactions**

We assist clients in structuring and analyzing sophisticated financial transactions, including sophisticated debt offerings and domestic and cross-border notional principal contracts (such as swaps, caps and floors), collars, options, futures and forward contracts, securities lending, repurchase contracts and other hedging transactions, including with respect to foreign currencies.

We have substantial experience in advising clients on the formation and operation of real estate investment trusts (REITs), including public and private REITs. We advise on the conversion of existing taxable or tax-exempt entities
Practice Group Description

into REITs; structuring umbrella partnership REITs (“UPREITS”); and public offerings and private placements of equity and debt securities of REITs. We have acted for clients in the acquisition, disposition and liquidation of private REITs; and property acquisitions and dispositions by REITs, including roll-up transactions and property exchange programs.

Together with the Corporate and Finance Departments’ investment management practice group, we regularly provide advice to public and private regulated investment company clients regarding all aspects of their activities, including SEC disclosure compliance, board presentations, structuring issues involving core/gateway, master/feeder and fund-of-funds structures, ongoing compliance with federal and state tax qualification requirements, mergers and acquisitions and hedging transactions.

Employee Benefits and Executive Compensation

We counsel our clients with respect to various aspects of qualified employee benefit plans, including plan design and administration, analysis of the income tax consequences of plan funding and distributions and application of ERISA fiduciary standards. In the qualified plan area, we have substantial experience in designing and amending plans to comply with the numerous statutory and regulatory changes affecting this area. We are actively involved in the employee benefits and executive compensation aspects of corporate acquisitions, mergers and reorganizations, providing advice relating to structuring of transactions in order to avoid or minimize employee-related liabilities and structuring and implementing benefit plans to satisfy legal requirements, as well as human resource objectives.

In the executive compensation area, we represent both employers and individual executives in connection with a variety of stock-based compensation arrangements (including incentive and non-qualified stock options, discounted stock options, phantom stock, stock purchase plans and stock appreciation rights), deferred compensation agreements and golden parachute contracts. We have designed insurance-related compensation vehicles and “rabbi trust” arrangements which provide security for the payment of deferred compensation. Our extensive qualified plan experience and executive compensation practice have allowed us to design sophisticated non-qualified deferred compensation arrangements supplementing executive benefits under qualified plans.

Tax Controversies and Litigation

Our work for clients includes tax audit and dispute resolution proceedings regarding all types of federal taxes before the IRS, the Tax Court, the Claims Court, and other federal trial and appellate courts. (The Tax Department also has considerable experience in state and local tax litigation, which is described under “State and Local Taxes.”) We prefer to work closely with the management
of a corporation in formulating an audit strategy prior to the filing of a tax return for the relevant tax year to avoid the imposition of the substantial understatement penalty, although we also act as special tax counsel for clients in audit and litigation matters. When we are retained after an audit has been completed, our approach to tax controversies is to consider all of the possible opportunities to achieve the most favorable resolution. We have had particular success in negotiating favorable settlements with the Internal Revenue Service on behalf of our clients, and in our experience a negotiated settlement almost always produces a better result for our clients. However, when it is not possible to negotiate a favorable settlement, we are fully able to try cases and have tried substantial cases in all of the tax forums and have argued before appellate courts.

The firm also represents individuals and corporations accused of tax and related criminal offenses in administrative and grand jury investigations, administrative conferences and criminal trials.

**State and Local Taxes**

Unlike the Tax Departments of most law firms, we have extensive experience in advising and representing our clients on state and local tax matters, whether they arise in the states where our offices are located, or throughout the United States. Our nationally recognized state and local practice services a diverse group of clients. Our representation of clients with respect to state and local taxes covers the full spectrum of state and local taxes, including corporate franchise and income taxes, sales and use taxes, real and personal property taxes, local business license taxes, gross receipts taxes, telecommunications taxes, severance taxes, capital stock taxes, documentary and other transfer taxes, and personal income taxes.

The work of the State and Local Tax Group includes planning and consulting with respect to state and local tax issues, representation in the audit process and administrative controversies, and prosecution of appeals through court litigation. We have been involved in many of the most important cases affecting state and local taxation, including a significant number of cases decided by the U.S. Supreme Court. The firm’s familiarity with tax systems across the United States has aided clients in efficiently resolving or contesting issues raised on audit simultaneously in more than one state. We have handled state administrative proceedings in virtually every state and currently have matters pending in more than half of the states.

In addition to our controversy work, we regularly assist clients in state and local tax planning and in structuring transactions. These efforts include multistate analyses in the context of mergers, acquisitions, and dispositions, as well as in connection with reorganizing current operations.
Proposed Regulations Clarify the Definition of “Real Property” Under the REIT Rules

By Thomas Humphreys, Stephen Feldman, Michelle Jewett, Shane Shelley and Shiukay Hung

BACKGROUND

On May 14, 2014, the Treasury Department published proposed regulations (the “Proposed Regulations”) clarifying the definition of “real property” under the real estate investment trust (“REIT”) rules.¹ The issuance of the Proposed Regulations follows an Internal Revenue Service (“IRS”) moratorium on issuing private letter rulings (“PLRs”) with respect to REITs² during which time the IRS analyzed whether recent PLRs³ addressing types of assets that are not directly covered by the existing regulations regarding what constitutes “real property” (which were promulgated in 1962 (the “Existing Regulations”))⁴ and IRS published rulings issued between 1969 and 1975 (the “Early Guidance”) were consistent with the Existing Regulations and Early Guidance. In connection with that analysis, the IRS began a project to “modernize” the Existing Regulations to provide regulatory guidance for those less traditional types of property.

The Proposed Regulations expand the definition of “real property” in the Existing Regulations to include the types of property for which the IRS provided favorable rulings in the Early Guidance and the more recently issued PLRs. This guidance should be welcome for REITs seeking to invest in these types of property because a taxpayer cannot rely on a PLR received by another taxpayer. The Proposed Regulations also provide a framework for determining whether property that is not specified in the Proposed Regulations should be characterized as real property and include detailed examples illustrating the application of the framework.

Notably, the Proposed Regulations do not apply to definitions of “real property” outside of the REIT rules (e.g., for purposes of FIRPTA or depreciation) given the different purposes for and interests involved in those definitions. In addition, the preamble to the Proposed Regulations expressly states they do not provide any guidance with respect to whether a particular item of income generated by these assets constitutes “good” REIT income for purposes of the REIT’s gross income test. The IRS and the Treasury Department view these Proposed Regulations as a clarification of the existing definition of real property and are proposed to be effective for calendar quarters beginning after these Proposed Regulations are finalized. We expect that the Proposed Regulations will be subject to significant comment and modification before promulgated in final form.

CLARIFIED DEFINITION OF REAL PROPERTY

The Proposed Regulations define “real property” to include land, inherently permanent structures and structural components, specify certain assets that are per se “real property” for purposes of the REIT rules and adopt a framework for determining whether property that is not specified in the Proposed Regulations should be characterized as real property and include detailed examples illustrating the application of the framework.

¹ (REG-150760-13).
³ For example, the IRS had ruled favorable on REITs owning casinos, prisons, data centers, billboards, pipelines, cell-towers, and timber.
⁴ Treas. Reg. § 1.856-3(d).
using a facts and circumstances approach to determine whether other assets are real property. The starting point is to
determine whether an item is a “distinct asset” based on all of the facts and circumstances. Each distinct asset is
analyzed separately from any other assets to determine if the asset qualifies as real property.

Land

Land is defined in the Proposed Regulations to include water and air space superjacent to land and natural products and
deposits that are unsevered from the land.

Inherently Permanent Structures

The Proposed Regulations define an inherently permanent structure as any building or other structure permanently affixed
to land. In general, inherently permanent structures must serve a passive function such as housing rather than an active
function such as manufacturing. The Proposed Regulations provide a safe harbor list of inherently permanent structures
which include microwave, cell, broadcast, and electrical transmission towers, telephone poles, parking facilities, bridges,
tunnels, roadbeds, railroad tracks, transmission lines, pipelines, offshore drilling platforms, storage structures such as
silos and oil and gas storage tanks, and outdoor advertising displays per election under §1033(g). If the distinct asset is
not on the safe harbor list, then a facts and circumstances test is applied based on certain factors generally related to
whether the asset is passive and whether the asset can be removed from the land or other real property to which it is
affixed.

Structural Components

The proposed Regulations define structural components as any distinct asset that is a constituent part of and integrated
into an inherently permanent structure, serves the inherently permanent structure in its passive function and, even if
capable of producing income other than consideration for the use or occupancy of space, does not produce or contribute
to the production of such income. A structural component is real property only if it is held by the taxpayer together with
the taxpayer’s interest in the inherently permanent structure to which the structural component is functionally related. The
Proposed Regulations provide a safe harbor list of structural components which include wiring, plumbing systems, central
heating and air conditioning systems, elevators or escalators, windows, doors, sprinkler systems and fire alarms, and
integrated security systems. If the distinct asset is not on the safe harbor list, then, again, a facts and circumstances test
is applied based on certain factors that are similar to those used in analyzing inherently permanent structures.

Intangible Assets

The Proposed Regulations clarify when an intangible asset should be treated as real property. In general, under the
Proposed Regulations, an intangible asset is real property or an interest in real property if it derives its value from real
property or an interest in real property, is inseparable from that real property or interest and does not produce or
contribute to the production of income other than consideration for the use or occupancy of space. The Proposed
Regulations provide that a license or permit for the use, enjoyment or occupation of land is an interest in real property but
a license or permit to engage in or operate a business is not.

APPLICATION

The examples in the Proposed Regulations highlight the tax treatment of several fact patterns for which the REIT
community had been seeking guidance in recent years:
Client Alert.

Crops

Example 1 of the Proposed Regulations involves a REIT that leases perennial fruit-bearing plants coupled with an easement (presumably to grant the tenant access to the plants). Among other things, the example concludes the plants themselves constitute land and are, therefore, real property (although the fruit, once severed, would not be).

Solar Property

In Example 8, the Proposed Regulations address the treatment of a solar energy site where the solar electricity is transmitted to an electrical power grid and sold to third parties. Although the land, the mounts, and the exit wires are treated as real property, the Proposed Regulations determine that photovoltaic modules should not be treated as real property because they actively generate electricity that is sold to third parties.

However, Example 9 of the Proposed Regulations treats photovoltaic modules as real property where they are mounted on land adjacent to an office building owned by a REIT, the solar electricity generated from the panels is used primarily to power that specific building and the tenant only occasionally transfers electricity to a utility company.

Although not necessarily favorable for taxpayers entertaining the idea of “solar REITs,” the Proposed Regulations do clarify the position of the IRS that photovoltaic panels used in commercial-scale solar facilities should not be “real property” for purposes of the REIT rules. It is interesting to note that the Examples only describe solar power. It is unclear what this means for other forms of renewable energy.

Pipeline Transmission System

In Example 10, the Proposed Regulations illustrate that in an oil pipeline transmission system comprised of underground pipelines, storage tanks, valves, vents, meters and compressors, the pipelines, storage tanks, vents, valves are real property but the meters and compressor are not.

Intangible Assets

Practitioners have speculated whether intangible assets such as a concession agreement to collect tolls would be considered real property. While the Proposed Regulations do not clearly address this particular example, they do provide some illustrative guidance. In Example 12, a special use permit to place a cell tower on federal government land is treated as an interest in real property because it is similar to a leasehold (i.e., it provides a right to use property). This contrasts with Example 13 where a State license to operate a casino that applies only to one building and cannot be transferred to another location is treated as a license to engage in business and is not real property.

CONCLUSION

The Proposed Regulations are helpful in that they codify most of the favorable positions that the IRS has taken in PLRs as well as the framework that it generally has used in evaluating whether assets constitute real property. This should reduce the number of REIT PLRs being sought from the IRS. However, aside from the guidance on photovoltaic panels and certain other matters, the IRS has not used the Proposed Regulations to issue additional guidance in respect of many issues that are under discussion in the market place or could otherwise be expected to come up in the PLR program.
About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on The American Lawyer’s A-List for 10 straight years, and Fortune named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.
EDITOR’S NOTE

We can’t think of a better way to end Q1 2014 than by bringing you the year’s first issue of Tax Talk. Although Tax Talk is now in its seventh year (nothing to sniff at, especially if you’re counting in dog years), we still strive to bring you the most interesting tax highlights and developments from the past quarter.

Although this issue of Tax Talk covers a lot of ground, we would be remiss if we didn’t begin by sharing the latest from the Foreign Account Tax Compliance Act (“FATCA”) front. With FATCA going “live” on July 1, 2014, the flurry of FATCA-related activity from the Treasury Department and Internal Revenue Service (“IRS”) has reached a veritable fever pitch. To “complete” and “clarify” the existing FATCA regulatory framework (nothing short of a Herculean task), the government released two sets of FATCA-related regulations in February. The first set of regulations contains numerous amendments to the FATCA regulations previously issued in January 2013. According to the Treasury Department, these amendments are designed to reduce certain unnecessary compliance-related burdens without jeopardizing FATCA’s compliance objectives. The second set of regulations seeks to coordinate the complicated due diligence, reporting and withholding regimes under FATCA with the traditional reporting and withholding obligations under Chapter 3 of the Code. The IRS has also finalized a few (but not all) of the withholding forms it had previously released in draft form. Finally, the Treasury Department has continued to expand its network of Intergovernmental Agreements (“IGAs”) and, as we go to print, has released a list of IGAs that are considered to be in

continued on page 2
effect, although they have not been formally finalized. Needless to say, there is a lot for Foreign Financial Institutions (“FFIs”) and their tax advisers to digest in the waning weeks before FATCA officially kicks off. For more information on FATCA, please be sure to visit our website, at www.KNOWFatca.com.

FATCA is by no means the only area where the IRS has been busy as of late. In the publicly traded partnership sphere, the IRS has been churning out private letter rulings on “qualifying income” – especially with respect to MLPs that invest in energy and natural resource assets. However, the IRS has announced “pencils down” as it regroups to consider whether it has gone too far afield in issuing private letter rulings regarding the treatment of income generated by nontraditional assets.

Although the scope of the proposed regulations governing “dividend equivalent” payments continues to be a hot topic on Wall Street, issuers of certain equity-linked instruments may now breathe a (temporary) sigh of relief. In December, we had a scare when the IRS announced these rules (including the new “delta” test for measuring the equivalence of a derivative to the underlying stock) would take effect for instruments issued after March 4, 2014. However, on March 4, 2014, the IRS released a notice indicating its intent to limit withholding to equity-linked instruments issued on or after the date that is 90 days after the date of publication in the U.S. Federal Register of final regulations addressing dividend equivalent withholding.

In this issue of Tax Talk, we also discuss newsworthy tax highlights impacting borrowers and lenders. For starters, we provide a brief analysis of Revenue Procedure 2014-20, which provides a safe harbor under which the IRS will treat indebtedness that is secured by 100% of the ownership interest in a disregarded entity holding real property as indebtedness that is secured by real property for purposes of Section 108(c)(3)(A). We also discuss recent IRS private guidance regarding the impact of underwriting costs incurred in connection with issuing debt.

Finally, we round out this issue of Tax Talk with a summary of Validus Reinsurance Ltd. v. United States, which addresses the federal insurance excise tax under Section 4371; the tax implications to REITs of the “Tax Reform Act of 2014,” another tax reform proposal by Rep. Dave Camp; and recently released IRS guidance on virtual currency, such as Bitcoin.

As always, our regular section, MoFo in the News, concludes this issue of Tax Talk.

**FATCA UPDATE: IRS RELEASES NEW REGULATIONS, NEW FORMS, AND NEW IGAS**

The first quarter of 2014 has seen a flurry of FATCA activity. Withholding under FATCA is scheduled to take effect beginning July 1, 2014, and before you ask, the IRS has been adamant that there will be no more delays in FATCA implementation. However, this has not stopped speculation among practitioners who hold out hope for another six months to prepare.

The first FATCA milestone of 2014 came on January 1, the first day on which an FFI could finalize its registration with the IRS on the FATCA registration portal. Although the portal has been live since August 19, 2013, information input by foreign financial institutions (“FFIs”) in 2013 was not regarded as final.

On February 20, the IRS made good on its promise for more FATCA guidance and released two sets of final and (temporary) FATCA regulations. The first set of regulations (the “FATCA Regulations”) makes changes to the FATCA regime to address comments received by the IRS and the Treasury Department. While the FATCA Regulations do not change the scope or timeline of FATCA implementation, they provide helpful clarification on a number of specific fact patterns. For example, the IRS and Treasury Department received comments that withholding agents may not know that an obligation that is grandfathered under FATCA (because, e.g., it was issued prior to July 1, 2014) has been materially modified by the issuer, causing the obligation to lose its grandfathered status and triggering a withholding obligation on the part of the withholding agent. To address this, the FATCA Regulations provide that a withholding agent (other than the issuer of the obligation) is required to treat a modification of an obligation as a material modification only if the withholding agent has actual knowledge of the material modification, such as when the withholding agent receives disclosure indicating that there has been or will be a material modification.

At the same time it released the FATCA Regulations, the IRS also released final and temporary regulations (the “Coordination Regulations”) that coordinate FATCA with the pre-existing withholding regime on payments to non-U.S. persons under Chapter 3 and the backup withholding regime under Chapter 61. According to the preamble, the Coordination Regulations provide guidance “in order to develop a more integrated set of
rules that reduces burdens (including certain duplicative information reporting obligations) and conforms with the due diligence, withholding, and reporting rules under these provisions to the extent appropriate in light of the separate objectives of each chapter.” The Coordination Regulations generally remove inconsistencies in the documentation requirements under these three regimes, eliminate duplicative information reporting in certain instances, and eliminate duplicative withholding requirements in certain instances.

In addition to new regulations, the IRS also released finalized Forms W-8BEN, W-8BEN-E, and W-8ECI. Form W-8BEN may now only be used by non-U.S. individuals. Entities must use Form W-8BEN-E or W-8ECI depending on whether the entity is claiming that income is effectively connected with a U.S. trade or business. Foreign entities using Form W-8BEN-E must check a box indicating their FATCA status and provide additional information based on that status. The 30-part Form W-8BEN-E is considerably more complex than the prior W-8BEN that foreign entities would provide in order to indicate their foreign status.

Finally, on April 2, the IRS significantly expanded the list of foreign jurisdictions that will be treated as having an intergovernmental agreement (“IGA”) in effect. Announcement 2014-17 (the “Announcement”) provides that jurisdictions are treated as having an IGA in effect includes jurisdictions that, before July 1, 2014, have reached agreements in substance with the United States on the terms of an IGA, even if those agreements have not yet been signed. The complete list of jurisdictions that have signed IGAs and jurisdictions that have reached IGA agreements in substance can be found on the IRS’s FATCA website.3 The Announcement also extends the deadline by which an FFI can register on the IRS’s FATCA portal in order to be included on the first FFI list, due to be released on June 2. The new deadline is May 5, rather than April 25, as originally announced.

For copies of the new regulations, the new IRS forms, and the Announcement, as well as updates on the latest FATCA news, see our FATCA website, KNOWFata.com (www.KNOWFata.com).

**NO RULE POLICY ON MLPS**

The IRS has announced, informally, that it has temporarily stopped issuing private letter rulings on whether income received by a publicly traded partnership (“PTP”) constitutes “qualifying income.” This hiatus, referred to by the IRS as a “pause,” comes on the heels of a rash of ruling requests by MLPs investing in energy and natural resource assets. This break in the action will allow the IRS to catch its breath and regroup so that it may reconsider the scope of what passive-type income may be distributed to investors (i.e., partners) without triggering an entity level tax for the PTP. We’ll be sure to keep you posted as this story unfolds.

**IRS INTRODUCES NEW GRANDFATHER RULE FOR EQUITY-LINKED INSTRUMENTS UNDER SECTION 871(M)**

On March 4, 2014, the IRS released Notice 2014-14 (the “Notice”), announcing the intention of the IRS and the Treasury Department to modify proposed regulations under Section 871(m) (the “Proposed Regulations”) when the regulations are finalized.

Under the Proposed Regulations, “dividend equivalent” payments under certain securities lending transactions, sale-repurchase transactions, specified notional principal contracts (“NPCs”), and specified equity-linked instruments (“ELIs”) are treated as dividends from U.S. sources and potentially subject to U.S. withholding tax. The Proposed Regulations ask whether an NPC or ELI has a “delta” of .70 or greater. If so, the proposed regulations treat payments on the instrument made after January 1, 2016, that reference dividends paid on a U.S. corporation’s stock as “dividend equivalents.” An NPC’s or ELI’s delta is the ratio of the change in the fair market value of the instrument to the change in the fair market value of the underlying property referenced by the instrument.

The Notice announces the intention of the IRS and the Treasury Department to limit the definition of specified ELIs to ELIs issued on or after 90 days after the date of publication of final Section 871(m) regulations (the “Grandfather Date”). The Notice is a welcome announcement because the Proposed Regulations would have applied to ELIs acquired on or after March 5, 2014 including ELIs issued before that date but acquired on or after March 5, 2014 in the secondary market. The Notice indicates that the final Section 871(m) regulations will contain a provision that exempts ELIs issued prior to the Grandfather Date, regardless of when they are acquired. The Notice provides comfort to issuers and holders of ELIs who might otherwise be subject to withholding on ELIs issued before the rules were finalized. The Notice...
does not address the treatment of NPCs, and therefore, “dividend equivalents” in specified NPCs may become subject to withholding regardless of when they were issued.


Under Section 108(a)(1)(d), a taxpayer (that is not a C corporation) may exclude discharge of indebtedness income from gross income if the indebtedness is “qualified real property business indebtedness.” Under Section 108(c)(3), one of the requirements for “qualified real property business indebtedness” is that the indebtedness must be incurred or assumed by the taxpayer in connection with real property used in a trade or business and be “secured by such real property.” The term “secured by such real property” is not defined in Section 108 or the legislative history. Rev. Proc. 2014-20 provides a safe harbor under which the IRS will treat debt as secured by real property for purposes of Section 108(c)(3)(A). The requirements of the safe harbor are as follows:

1. The taxpayer or a wholly owned disregarded entity of the taxpayer (“Borrower”) incurs indebtedness.

2. Borrower directly or indirectly owns 100% of the ownership interest in a separate disregarded entity owning real property (“Property Owner”). Borrower is not the same entity as Property Owner.

3. Borrower pledges to the lender a first priority security interest in Borrower’s ownership interest in Property Owner. Any further encumbrance on the pledged ownership interest must be subordinate to the lender’s security interest in Property Owner.

4. At least 90% of the fair market value of the total assets (immediately before the discharge) directly owned by Property Owner must be real property used in a trade or business and any other assets held by Property Owner must be incidental to Property Owner’s acquisition, ownership, and operation of the real property.

5. Upon default and foreclosure on the indebtedness, the lender will replace Borrower as the sole member of Property Owner.

The Rev. Proc. specifically states that a taxpayer is not precluded from arguing that its debt satisfies the “secured by” requirement even though it does not meet the requirements of the safe harbor.

**FAA 20141001F: UNDERWRITING COSTS MUST BE CAPITALIZED**

In a piece of heavily redacted private guidance, the IRS addressed the deductibility of certain underwriting costs. At issue was whether payments made to compensate another party for underwriting costs associated with debt were deductible as repurchase premium under Treasury regulation § 1.163-7(c) or, alternatively, whether the payments should be capitalized under Treasury regulation § 1.263(a)-5.

Generally, under Treasury regulation § 1.163-7(c), if a debt instrument is repurchased by the issuer for a price that is greater than the debt instrument’s adjusted issue price, that difference, known as repurchase premium, is deductible as interest in the taxable year in which the repurchase occurs. On the other hand, under Treasury regulation § 1.263(a)-5, certain costs incurred in connection with an issuance of debt must be capitalized and amortized on a straight-line basis over the term of the debt. All things being equal, then, repurchase premium is generally more beneficial because it gives rise to an immediate deduction. In short, the character of the payment – whether as part of a debt repurchase or debt issuance – matters.

Although the facts were completely redacted, it appears that the taxpayer had an outstanding debt obligation, “Debt M,” which it wanted to repurchase. At the same time, the taxpayer evidently wanted to issue other debt, “Debt N.” The question, therefore, came down to whether the payment was made in connection with the retirement of Debt M or, alternatively, the issuance of Debt N. The IRS ruled that the payments at issue, as a factual matter, were made to facilitate the issuance of Debt N, not the repurchase of Debt M. As a result, because the underwriting costs were associated with the issuance of Debt N, they had to be capitalized.

**VALIDUS REINSURANCE LTD. V. UNITED STATES**

In *Validus*, the U.S. District Court for the District of Columbia held that the insurance federal excise tax under Section 4371 does not apply to retrocessions. A retrocession is a secondary reinsurance where a reinsurer buys insurance from another insurance company to protect the reinsurer in the event that it is required to pay claims under the reinsurance policy. Section 4371 provides that an excise tax is imposed on each “policy of insurance” or “policy of reinsurance” issued by any foreign
issuer or reinsurer. The court held that the definition of “policy of reinsurance” does not include retrocessions under a plain reading of the statute.

**CHAIRMAN CAMP RELEASES “DISCUSSION DRAFT” TARGETING REITS**


There appear to be two general policies guiding the proposals. First, the discussion draft reflects Rep. Camp’s concern that a number of taxable C corporations have converted into REITs simply to avoid an entity level income tax, although these companies do not necessarily fit the mold of a traditional real estate company engaged in the business of acquiring diversified and passive interests in real estate. To that end, the discussion draft contains proposals to reduce erosion of the corporate tax base, for example, by tightening the rules related to qualifying real estate assets. Second, the discussion draft includes provisions designed to make the existing rules more attractive to traditional REITs, such as eliminating the prohibition on distribution of preferential dividends by publicly offered REITs.

Although there is no substitute for wading through all 979 pages of the discussion draft itself, we will spare you the trouble by summarizing below a few of the key aspects of the REIT-related provisions.

**Prevention of Tax-Free Spin-offs Involving REITs**

To curb, in part, perceived abuses by corporations creating REITs by spinning off qualified real-estate related assets tax-free, Rep. Camp’s discussion draft contains provisions excluding REITs from being able to satisfy the active trade or business requirement for tax-free spin-off transactions. In addition, under the proposal, a distributing corporation or controlled corporation in the spin-off would not be able to elect to be treated as a REIT for 10 years following a tax-free spin-off.

**Increased Waiting Period for REIT Election Following Revocation or Termination**

Currently, after an election to be treated as a REIT has been revoked or terminated, a corporation may not elect to be treated as a REIT for five years. The discussion draft would extend this lockout period to 10 years.

**Limitation on Fixed Percentage Rent and Interest Exceptions**

Generally, rents received by a REIT that are based on a fixed percentage of receipts or sales – as opposed to rents that are contingent on income or profits – are treated as qualifying rental income. The discussion draft would alter this rule by carving out amounts that are based on a fixed percentage of receipts or sales to the extent they are received from a single corporate tenant and are more than 25% of the total amount of rent received by the REIT that is based on a fixed percentage of receipts or sales.

**Preferential Dividend Rules for Publicly Offered REITs Repealed**

Currently, a REIT may not claim a deduction for preferential dividends, such as dividends that are not distributed pro rata to all shareholders, without preference to any share of stock over others within the same class. The discussion draft would eliminate this rule, permitting publicly offered REITs to distribute preferential dividends.

**Debt Issued by Publicly Offered REITs Treated as Real Estate Assets**

The proposal would also expand the categories of assets that would qualify as real estate assets under the “75% assets test” to include debt instruments issued by publicly offered REITs, as well as interests in mortgages on interests in real property (an apparent expansion of current law that already permits ownership in mortgages secured by real property), although such instruments could not comprise more than 25% of the value of the REIT’s assets. Likewise, income from debt instruments issued by publicly offered REITs would qualify as passive income under the “95% income test,” but not the “75% income test” unless they already are treated as qualified income under current law.

**Reduction in Ownership of a TRS**

Currently, a REIT may not own more than 10%, by vote or value, of any one entity, other than a taxable REIT subsidiary (“TRS”), provided that subsidiary’s stock does not represent more than 25% of the value of the REIT’s assets. The discussion draft would reduce the 25% limitation to 20%.

**Built-In Gain Immediately Taxed Upon REIT Conversion**

When a C corporation elects to be treated as a REIT, the REIT is subject to tax on certain built-in gain attributed to property it held while operating as a C corporation. This tax is generally imposed on gain recognized within 10 years from when the C corporation elected to be
treated as a REIT. Under the discussion draft, any built-in gain would be immediately recognized by the C corporation upon an election to be treated as a REIT.

**REIT Interests Included in Definition of FIRPTA Company**

Under the rules relating to dispositions of United States real property interests, gains and losses are treated as effectively connected, which generally results in certain withholding and reporting requirements. Where stock in a U.S. corporation that is a United States real property interest is sold by a foreign person, the gain is not subject to withholding, provided the U.S. corporation does not hold any interest in U.S. real property at the time of disposition and any disposition of any such interests occurs in fully taxable transactions. However, under the discussion draft, this exception would not apply to shares in a REIT that disposed of its interest in U.S. real property with respect to gain on which it claimed a dividends paid deduction.

The proposal also contains other provisions relevant to REITs, such as rules impacting timber REITs, tangible property held by a REIT with a class life of less than 27.5 years (which could impact certain non-traditional REIT assets, such as infrastructure REITs), REIT dividends, distributions of non-REIT E&P, hedging income, treatment of certain services provided by a TRS, and certain limitations on REIT dividends with respect to the indirect foreign tax credit.

**IRS ISSUES GUIDANCE ON VIRTUAL CURRENCY**

In Notice 2014-21, the IRS issued guidance on virtual currency, such as Bitcoin. The notice, which is in the format of answers to frequently asked questions, describes how existing tax principles apply to transactions involving virtual currency.

By way of background, the IRS explained that virtual currency behaves like “real” currency, in that it may be used and accepted as a medium of exchange, although it is not recognized as legal tender in any jurisdiction. The notice, however, applies only to “convertible” virtual currency, which the IRS describes as virtual currency that has an equivalent value in real currency, or that acts as a substitute for real currency. In other words, convertible virtual currency is virtual currency that may be purchased for, or exchanged into, U.S. dollars or euros, for example.

As a threshold matter, the notice provides that convertible virtual currency is simply property for U.S. federal income tax purposes, even if it may be exchanged for real currency. The IRS’s conclusion, of little surprise, helpfully confirms that transactions involving virtual currency will not be subject to the rules governing foreign currency. Instead, taxpayers will be subject to the full gamut of tax principles generally applicable to property transactions. Although treatment of convertible virtual currency as property makes sense and, at first blush, seems relatively straightforward, even some of the most basic transactions involving virtual currency are ripe with latent tax implications and may result in a record-keeping nightmare for holders of virtual currency.

As an example, virtual currency holders will be required to track their basis in the currency since any exchange is likely to result in the holder recognizing gain or loss. The character of the gain or loss, in turn, will depend on whether the virtual currency is a capital asset in the hands of the taxpayer. In this vein, complex valuation issues abound. In anticipation of these valuation questions, the notice provides that if a virtual currency is listed on an exchange and the exchange rate is established by market supply and demand, the taxpayer may use the fair market value of the virtual currency as determined by converting the virtual currency into U.S. dollars at the exchange rate. Of course, this begs the question of which exchanges will be considered adequate marketplaces with respect to the relevant virtual currency – a question well outside the scope of our expertise.

Furthermore, if a virtual currency is received as payment for goods or services, the recipient will be required to include the fair market value of the virtual currency in gross income. Indeed, to the extent virtual currency is received as wages, it may be subject to employment taxes in appropriate circumstances. Moreover, transactions involving virtual currency may implicate certain information reporting and backup withholding obligations. Finally, “mining” – the process of creating or issuing the currency by solving what essentially amounts to complicated math problems – may give rise to gross income, in cases where the taxpayer receives virtual currency as compensation for these activities.

In sum, although virtual currency may be commonplace in cyberspace, it continues to pose new and unexpected tax challenges. For now, however, virtual currency holders will have to make do with the guidelines set forth in the notice. As the IRS continues to navigate these uncharted waters, we promise to keep you in the loop.

MOFO IN THE NEWS

On January 6, 2014, MoFo partners Oliver Ireland and Jay Baris participated in a West LegalEdcenter webcast called “The Volcker Rule: Impact of the Final Rule on Banking Institutions.” The webcast summarized certain impacts of the Final Rule on banking institutions, including foreign banking organizations. It also addressed various other aspects of the Final Rule.

Also on January 6, 2014, MoFo partners Anna Pinedo and David Lynn participated in a teleconference called “Regulation A+ (Section 3(b)(2)) Offerings: Stepping Stone to IPO, or IPO Alternative?” The teleconference discussed the proposed Reg A+ rules and provided a perspective on the utility of Regulation A+ and on the Regulation A+ market.

On January 7, 2014, MoFo partner Anna Pinedo and MoFo of counsel Nilene Evans participated in a PLI webcast called “FINRA – Essentials for Deal Lawyers.” This webcast provided a review of the FINRA rules applicable to public offerings, including FINRA’s new review process.

On January 8, 2014, MoFo partners Anna Pinedo and Lloyd Harmetz and MoFo senior of counsel Jerry Marlatt participated in a seminar called “Capital Markets and Regulatory Reform Update for Canadian Entities.” This seminar consisted of three sessions, which covered Dodd-Frank implementation, practical impacts of the JOBS Act, and other U.S. capital markets developments and cross-border derivatives issues.

On January 10, 2014, MoFo partners Anna Pinedo and Jay Baris participated in a PLI webcast called “FINRA – Use of Social Media in Offerings and Corporate Communications and by Registered Entities.” This briefing focused on the considerations for issuers, broker-dealers, registered investment advisers and commodity pools in using social media, whether for corporate communications or in the context of securities offerings.

On January 14, 2014, MoFo hosted a Structured Products Association conference in New York. MoFo partner Anna Pinedo participated in the conference, which presented the significant new developments in the legal-regulatory-compliance landscape.

On January 15, 2014, MoFo partners Remmelt Reigersman and David Strong participated in a webcast called “Understanding Up-C IPO Structures – The Tax Benefits Explained.” This webcast explained the various economic and tax benefits associated with “Up-C” structures, including an explanation of the key terms of the “Tax Receivable Agreement” that is typically entered into by the selling shareholders and the public company.


On January 22, 2014, MoFo of counsel Brad Berman participated in a West LegalEdcenter webcast called “Bank Note Programs.” This presentation provided an overview of the Section 3(a)(2) exemption for issuances of bank securities.

MoFo senior of counsel Jerry Marlatt participated in the American Securitization Forum 2014 from January 26-29, 2014. This conference covered the most relevant topics and challenges relating to structured finance.

On January 28, 2014, MoFo partners Peter Green, Jeremy Jennings-Mares, and Anna Pinedo and MoFo of counsel James Schwartz participated in a PLI webcast called “Derivatives Regulation: Dodd-Frank Title VII vs. EMIR.” This presentation explored the similarities and differences between the U.S. and European approaches to derivatives regulation.


MoFo partner Anna Pinedo, senior of counsel Ken Kohler and of counsel James Schwartz participated in the IFLR webcast called “Dodd-Frank Implementation: What to Expect in 2014” on January 30, 2014. This webcast focused on the key rules expected to be finalized in 2014, including the LCR requirement, a long-term debt requirement; the Volcker Rule; and other significant Dodd-Frank milestones.

On February 3, 2014, MoFo partners Oliver Ireland, Dan Nathan and Anna Pinedo participated in a teleconference called “The Impact of the Volcker Rule on Proprietary Trading.”

On February 5, 2014, MoFo senior of counsels Ken Kohler and Jerry Marlatt participated in a teleconference called “The Volcker Rule and Securitization.”

Also on February 5, 2014, MoFo partners Marty Dunn and David Lynn participated in a West LegalEdcenter webcast called “JOBS Act Update: Regulation D and
Rule 144A Offerings in 2014.” This webcast explored the impacts of the SEC’s rules to end the ban on general solicitation in certain private offerings that came into effect on September 23.

On February 6, 2014, MoFo partners Jay Baris and Henry Fields participated in a teleconference called “The Volcker Rule and Covered Funds.”

On February 13, 2014, MoFo partners Barbara Mendelson and Henry Fields participated in a teleconference called “The Impact of the Volcker Rule on Foreign Banking Organizations.”

MoFo partner Anna Pinedo and senior of counsels Ken Kohler and Jerry Marlatt participated in a West LegalEdcenter webcast called “The Volcker Rule: Impact of the Final Rule on Securitization Investors and Sponsors” on February 18, 2014. This webcast summarized certain impacts of the Final Rule on banking entities that engage in asset-securitization activities as investors, sponsors, or providers of credit or liquidity support.

Also on February 18, 2014, MoFo partner Lloyd Harmetz and senior of counsel Jerry Marlatt held an in-house seminar titled “How Foreign Banks Can Finance in the United States.” This seminar discussed how to register in the United States, setting up a Rule 144A or bank note program for straight debt, and other topics pertaining to foreign banks looking to finance in the United States.

On February 20, 2014, MoFo sponsored a seminar in conjunction with the DC Bar titled “Implementing Regulation A+.” MoFo partner Anna Pinedo gave a presentation discussing the SEC’s proposed rules to implement the mandate of Title IV of the JOBS Act, and provided a perspective on the utility of Regulation A+ and the Regulation A+ market.

MoFo partners Anna Pinedo and Jay Baris participated in a West LegalEdcenter webcast called “Social Media for Banks and Financial Services Institutions” on February 25, 2014. This webcast focused on the considerations for issuers, broker-dealers, registered investment advisers, and commodity pools in using social media, whether for corporate communications or in the context of securities offerings.

On February 26, 2014, MoFo partners Anna Pinedo and Jeremy Jennings-Mares spoke on a panel at the IFLR Bank Capital Seminar. This seminar explored the recent changes in bank capital rules.

MoFo partner Jeremy Jennings-Mares spoke on a panel titled “Important Regulatory Developments on the Horizon: Bail-In and the New Bank Resolution Regime” during IMN’s 7th Annual Global Covered Bonds Conference on February 27-28, 2014. This conference covered the latest issues in the covered bonds market.

On February 28, 2014, MoFo partners Henry Fields, Oliver Ireland, and Dan Nathan and MoFo senior of counsel Ken Kohler participated in an IFLR webcast called “The Volcker Rule.” This webcast summarized certain impacts of the final rule on banking institutions, including foreign banking organizations.

On March 6, 2014, MoFo partner Anna Pinedo and MoFo of counsel Nilene Evans held an in-house seminar called “FINRA Offerings & Research.” This seminar provided a review of the FINRA rules applicable to public offerings, including FINRA’s new review process.

Also on March 6, 2014, MoFo partner Anna Pinedo participated in an ALI CLE webcast called “Swaps Regulation under Dodd-Frank’s Title VII: Recent Developments.” This program explored the latest rule-making developments regarding international security-based and other swap transactions.


On March 11, 2014, MoFo partners Oliver Ireland and Henry Fields participated in a PLI webinar titled “Federal Reserve’s Prudential Regulations for US Banks.” This webinar summarized the Federal Reserve Board’s released final rules establishing enhanced prudential standards for bank holding companies and the extent to which certain of these requirements are likely to affect smaller banks.

On March 12, 2014, MoFo partner Henry Fields and MoFo senior of counsel Ken Kohler participated in a Western Independent Bankers’ webinar titled “The Volcker Rule – A Practical Discussion on the Final Rule Requirements.” This webinar discussed the impacts of the final Volcker Rule on community banks.

On March 14, 2014, MoFo partners Barbara Mendelson and Henry Fields participated in a PLI webinar titled “Federal Reserve’s Enhanced Prudential Supervision for Foreign Banks.” This webinar summarized the Federal Reserve Board’s released final rules establishing enhanced prudential standard requirements for certain foreign banking organizations operating in the United States.

On March 18, 2014, MoFo partner Dan Nathan, senior of counsel Bob Fleishman and of counsel Julian
Hammar held an in-house seminar titled “CFTC and FERC Enforcement and Compliance Update.” This seminar discussed the new enforcement tools wielded by the CFTC and FERC.

On March 25, 2014, MoFo partners Henry Fields and Barbara Mendelson hosted a teleconference titled “Federal Reserve’s Enhanced Prudential Supervision for Foreign Banks.” This teleconference covered the Federal Reserve Board’s final rules establishing enhanced prudential standard requirements for certain foreign banking organizations operating in the United States.

On March 25-26, 2014, MoFo partner Anna Pinedo chaired a PLI conference called “Private Placements and Other Financing Alternatives 2014.” This was the first in-person PLI conference that discussed the proposed crowdfunding rules, the proposed Reg A+ rules, and the practical issues emerging in connection with Rule 506 offerings using general solicitation. MoFo partner Marty Dunn also participated in the conference and spoke on the panels titled “Overview of 4(a)(2) and Regulation D” and “Staying Private, Private Secondary Markets, Using the Internet.”

On March 27, 2014, MoFo partners Anna Pinedo, Oliver Ireland, James Tanenbaum, and Remmelt Reigersman and of counsel James Schwartz hosted a variety of sessions during a financial institutions seminar in Charlotte, NC. The topics included Dodd-Frank regulatory reform, bank balance sheets and financing financial institutions, Volcker Rule and derivatives update, tax developments affecting financial products, and mortgage-related developments.

The materials from all of these sessions are available upon request by emailing Alexa Powers at alexapowers@mofo.com, or by visiting our website at www.mofo.com.

Awards

At the 2014 mtn-i Americas Awards, several of the deals that we worked on over the past year were honored with awards of their own. These include a $235 million offering by Bank of America Corporation of leveraged index return notes, linked to the Dow Jones Industrial Average, as well as a $128 million offering by the Bank of Nova Scotia of structured notes linked to the Raymond James Analyst Current Favorites Total Return Index.

About Morrison & Foerster

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on The American Lawyer’s A-List for 10 consecutive years. Chambers Global named MoFo its 2013 USA Law Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

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**United States Federal Income Tax Law**

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**Corporate + Securities Law**

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Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.
Thomas Humphreys is head of the Federal Tax Practice Group as well as co-chair of the Tax Department at Morrison & Foerster. Mr. Humphreys has extensive experience with the tax aspects of capital markets transactions, financial instruments, real estate investment trusts, mortgage and asset-backed securities, mutual funds, mergers and acquisitions, bankruptcy and reorganization, tax reporting and withholding (including the Foreign Account Tax Compliance Act or “FATCA”) and international transactions. He also works with investment banks and issuers on developing new financial products.

Mr. Humphreys is the author of Limited Liability Companies and Limited Liability Partnerships, published by Law Journal Seminars-Press. He is also a co-author of Federal Taxation of Partnerships and Partners, an online volume that is part of the CCH Expert Treatise Library. He is a frequent speaker on tax topics before various audiences including the Practising Law Institute.

Mr. Humphreys is an adjunct professor of law at New York University Law School, where he teaches Taxation of Financial Instruments in the LL.M. program.

Mr. Humphreys is also a solicitor, admitted as a member of the Law Society of England and Wales.

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University of California, Los Angeles (A.B., 1974)

University of California, Hastings College of the Law (J.D., 1977)

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Remmelt Reigersman is a partner in the New York office and a member of the firm’s Tax Department. His practice is concentrated on federal and international tax matters. Mr. Reigersman advises on a wide variety of sophisticated capital markets transactions and represents issuers, investment banks/financial institutions, and investors in financing transactions, including public offerings and private placements of equity, debt and hybrid securities, as well as structured products. Mr. Reigersman’s areas of expertise further include restructurings (both in and out of bankruptcy), debt and equity workouts as well as domestic and international mergers, acquisitions, reorganizations, and joint ventures.

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