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TAXTALK

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EDITOR'S NOTE

With the halfway mark of 2014 just behind us, we are pleased to share with you in this issue of Tax Talk some of the more noteworthy tax developments from Q2. The most important highlight of the past quarter from our neck of the woods is, without a doubt, FATCA going live July 1, 2014. Although the IRS and U.S. Treasury Department have signaled that the remainder of 2014 and all of 2015 are a "transition period," the government didn't slacken its pace in rolling out updated withholding forms, even as the FATCA deadline rapidly approached. The government also ramped up its intergovernmental approach to FATCA, entering into Intergovernmental Agreements ("IGAs") with countries such as China, India, Saudi Arabia, Singapore, and Hong Kong, just to name a few recent additions. This brings the IGA count to nearly 100, as of July 1, 2014, with more surely to come. For more information on FATCA, please be sure to visit our website, at www.KNOWFatca.com.

In spite of our FATCA preoccupation, this issue of Tax Talk also discusses other significant tax developments, such as the IRS's new regulations under Circular 230 governing written tax advice. In a substantial departure from the previous regulations, the IRS replaced the "covered opinion" rules with a single, simplified approach, designed to subject all written federal tax advice to one standard. As part of this guidance, the IRS made clear that a "one size fits all" Circular 230 email legend is not necessary in attorney/accountant communications.

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In other news, the IRS released private guidance addressing partnerships and financial instruments. In the first piece of guidance, the IRS addressed securities dealer activities of a partnership and whether those activities could be attributed to its partners (no, they cannot). In the second, the IRS addressed the consequences when a partnership no longer treats certain securities transactions as options and, as a result, stops deferring the associated gains, losses, income, or deductions (a change in accounting method and adjustment occurs).

Next, we provide an update on recently released proposed regulations addressing the scope of qualifying real estate assets for REITs: important rules as more and more corporations with nontraditional fixed assets are seeking to be treated as REITs. Turning from real estate to banking, this issue of Tax Talk also discusses a recent private letter ruling addressing a bank's tax reporting obligations with respect to certain fee credit programs maintained for commercial customers.

Finally, this issue of Tax Talk discusses three items on the international tax front. The first clarifies that taxpayers do not need to report virtual currencies on FBARs for 2013. The second describes the IRS's application of the section 956 anti-abuse rule to debunk a transaction designed to minimize a U.S. corporation's section 956 inclusion. The third discusses modifications to the IRS's voluntary offshore disclosure program.

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

AS FATCA BEGINS, IRS ROLLS OUT WITHHOLDING FORMS, INCREASES IGA COUNT

FATCA went live on July 1, 2014. Just days before the deadline, the IRS and U.S. Treasury Department released the remaining Form W-8 withholding certifications, including instructions. In addition, the number of countries entering into IGAs increased and, as of July 1, 2014, the government had signed 34 Model 1 IGAs and 5 Model 2 IGAs. The government has also agreed in substance to 52 Model 1 IGAs and 8 Model 2 IGAs (these are IGAs that have not yet been signed, but are treated as "in effect" until December 31, 2014, the date they must be signed in order to remain in effect without interruption). This brings the total number of IGAs to just under 100. The IRS has also released a revised Qualified Intermediary agreement, which will be used for agreements with an effective date on or after June 30, 2014. This revised QI agreement now incorporates certain changes necessitated by FATCA, as well as updates to reflect recently released coordination regulations. Finally, in a gesture that appears to tacitly acknowledge the headache implementing FATCA is causing for financial institutions worldwide, the IRS and U.S. Treasury Department announced that 2014 and 2015 would be treated as a "transition period," during which the IRS will approach enforcement with an alleged degree of leniency, provided foreign financial institutions demonstrate a modicum of good-faith compliance. For more information on this development, please see our client alert, "IRS Issues Notice Signaling 2014 and 2015 as FATCA 'Transition Period'."[1]

IRS ISSUES FINAL CIRCULAR 230 RULES SIMPLIFYING WRITTEN TAX ADVICE REQUIREMENTS

On June 9, 2014, the U.S. Treasury Department and IRS issued final regulations replacing the "covered opinion" rules under Circular 230.[2] Effective June 12, 2014, the final rules now subject all written federal tax advice to one standard.

From a practical perspective, the most noticeable change tax practitioners (and their clients) will likely appreciate in the short run is the elimination of the need for the ubiquitous Circular 230 disclaimer from written communications, such as the disclaimers that are almost universally appended to emails from lawyers and accountants.

However, a more substantive and significant change will be the elimination of the need for determining whether written advice constitutes a "covered opinion" (as defined under the prior regulations) and whether the advice could instead be delivered in the form of a "limited scope" opinion. In addition, in either case, practitioners will also no longer be required to evaluate whether written advice satisfies all of the detailed requirements of the former Circular 230 rules, including the explicit statement of all facts relevant to the issues, identification of all assumed facts, and, if a limited scope opinion was not permissible, consideration of all significant federal tax issues that are relevant. As a result, practitioners and clients will have more flexibility to limit the scope of written advice to the particular issues of concern to the client.

Elimination of Covered Opinion Rules

The final rules eliminate the former covered opinion rules and replace them with a single "reasonableness"

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standard applicable to all written tax advice. As revised, Circular 230 requires practitioners in delivering written advice to:

- base all written advice on reasonable factual and legal assumptions (including assumptions as to future events);
- reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
- use reasonable efforts to identify and ascertain the facts relevant to written advice on each "federal tax matter";
- not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of any person if such reliance would be unreasonable;
- relate applicable law and authorities to facts; and
- not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit.

The final regulations also clarify that it is unreasonable for a practitioner to rely on representations if the practitioner knows or reasonably should know that one or more representations (or assumptions on which any representation is based) are incorrect, incomplete, or inconsistent.

The final regulations permit a practitioner, in providing written advice, to rely on advice of another person unless the practitioner knows or has reason to know that the opinion of the other person should not be relied on (including because such person either lacks the qualifications necessary to give the advice or has a conflict of interest that violates Circular 230 standards).

Finally, because the final regulations eliminate the disclosure requirements that were part of the covered opinion rules, practitioners will no longer need to include Circular 230 disclaimers to avoid the covered opinion rules. This will come as welcome news to practitioners and their clients alike because, as explained in the Preamble to the final regulations, Circular 230 "disclaimers are routinely inserted in any written transmission, including writings that do not contain any tax advice." As a result, the final rules effectively eliminate the use of Circular 230 disclaimers in emails and other written communications so that tax advice can be delivered on discrete issues without risk of violation of the covered opinion rules.

Heightened Standard of Review for Marketed Opinions

While the IRS will generally apply a "reasonable practitioner" standard that takes into account all facts and circumstances in reviewing practitioner compliance with the new written requirement rules, the IRS will give more weight to the additional risk caused by a practitioner's lack of knowledge of the taxpayer's particular circumstances in transactions in which the practitioner knows or has to reason to know the opinion will be used in promoting or marketing a potentially abusive tax shelter.

MORTGAGE CCA RAISES MORE QUESTIONS THAN IT ANSWERS

In a recent Chief Counsel Advice (CCA),[3] the IRS rejected a taxpayer's attempt to mark to market mortgage loans held in a non-REMIC securitization trust, finding, among other things, that loan modifications alone were not sufficient dealer activity. Unfortunately, the CCA's tangled analysis raises more questions than it answers.

In the CCA, the taxpayer was a partner in a partnership that originated and securitized mortgages. Some of the mortgages were securitized in non-REMIC trusts. Each trust that held the mortgages would issue notes to investors in exchange for cash. The trust residual was held by the partnership. The CCA does not state whether the mortgages were residential or commercial nor does it identify the type of securitization transaction.

The partnership was a dealer in securities; however, it also held some of its mortgages for investment. It is possible, although by no means clear, that the mortgages in the trusts at issue were held for investment. In any event, in a tax year after the trusts were created, the partnership sold the trust residuals to the taxpayer. The taxpayer took a basis in the mortgages equal to the amount of the trust debt plus the cash it paid to the partnership.

The taxpayer then tried to mark to market the mortgages, presumably in an attempt to claim an ordinary loss equal to the difference between the tax basis in the mortgages and their fair market value. (It would not be surprising if the mortgages were substantially depreciated when the taxpayer acquired them.) The taxpayer argued that it was a dealer in securities for federal income tax purposes either because (i) it was a partner in the partnership and the partnership was a dealer or (ii) modifications of the mortgages held by the trust (which were executed by the trust's sub-servicer) were dealer activity.

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Not surprisingly, the IRS rejected the taxpayer's arguments. However, the reasoning of the CCA is contorted and is already being questioned.[4] One issue in the analysis: the IRS concluded that the sub-servicer was not the taxpayer's agent. The IRS reasoned that there was no express agency under local law and that the sub-servicer was described as an "independent contractor" in the subservicing agreement. However, the construct for federal income tax purposes has always been that a mortgage servicer is a mortgage owner's agent. That is why a mortgage owner includes the full amount of income on a mortgage loan and then deducts mortgage servicing fees as an ordinary and necessary business expense or section 212 expense.[5] The IRS, instead, went off on a tangent about *National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1943), and *Commissioner v. Bollinger*, 485 U.S. 340 (1988), which deal with whether a corporation that is in form an owner can actually be an agent for federal income tax purposes. It is hard to see what those cases have to do with the CCA's facts; there was never any issue about whether the sub-servicer owned the mortgage loans.

In any event, the IRS also found that merely modifying loans was not a dealer activity. However, the analysis is fuzzy as to whether this is legally impossible or whether the loan modifications were not sufficiently regular and continuous in this particular case.

In an unusual twist, the IRS also had some helpful advice for the taxpayer, suggesting that perhaps the partnership could have marked to market the loans under Prop Reg. section 1.475-2(a), which requires a mark immediately before disposition by a mark-to-market taxpayer. One assumes that would only get the taxpayer half a loaf because it would only get its share of the partnership's loss rather than the full loss it anticipated.

IRS CONCLUDES CHANGE FROM TREATING SECURITIES AS OPTIONS IS AN ACCOUNTING METHOD CHANGE REQUIRING ADJUSTMENT

The IRS concluded in Chief Counsel Advice that a taxpayer had a change in accounting method when IRS Field Operations required the taxpayer to stop treating certain basket securities transactions as options.[6] Additionally, this change in accounting methods subjected the taxpayer to a Code Section 481(a) adjustment.

Taxpayer, a limited liability company, frequently traded securities through various basket transactions ("Basket Transactions") with an investment bank. In a typical Basket Transaction, Taxpayer would select and then actively trade a basket of securities. At the outset, Taxpayer would pay 10% of the notional amount of the securities referenced in a Basket Transaction, and the investment bank would provide the remaining 90%. A Basket Transaction contract defined Taxpayer's investment as a "premium" for which Taxpayer had an "option" to receive a cash settlement from the investment bank upon the contract's expiration. By treating a Basket Transaction as an option, the taxpayer attempted to defer any tax consequences until the contract's expiration.

IRS Field Operations concluded that Basket Transactions were not options and that Taxpayer was the beneficial owner of the underlying securities. Therefore, Taxpayer could not defer tax consequences resulting from the trading of securities within the baskets.

As a result, Field Operations placed Taxpayer on a new accounting method. An accounting method includes not only a change in a taxpayer's overall method of accounting but also the accounting treatment of any item of gross income or deduction, or a change in the treatment of a material item used in the overall accounting plan. ((Reg. 1.446-1(a)(1)) (A material item is any item that involved the proper time for the inclusion of the item in income or in a deduction) (Reg. 1.446-1(e)(2)(ii)(a)).) A taxpayer must keep an accounting method treatment unless the IRS requires a change or the IRS grants permission for a taxpayer to change the method. (Code Sec. 446(e).) When a taxpayer changes an accounting method, Code Section 481(a) requires an adjustment to taxable income to prevent items from being duplicated or omitted (including in tax years outside the statute of limitations). Thus, Field Operations imposed a Code Section 481(a) adjustment in the earliest tax year under examination.

Taxpayer argued that the proposed change was not an accounting method change, but was instead analogous to a change between treating an item as taxable or nontaxable, because it would require Taxpayer to recognize amounts that Taxpayer never intended to recognize. Thus, Taxpayer argued that the Section 481(a) adjustment should not apply.

In Chief Counsel Advice, the IRS disagreed with Taxpayer, concluding that there was a change in accounting method because the Field Operations' proposed change merely impacted *when* Taxpayer would recognize tax consequences, not *whether* Taxpayer would recognize them. The IRS noted that while it might be strictly true that Taxpayer never intended to

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recognize tax consequences from Basket Transactions, Taxpayer did intend to recognize an option gain or loss when the Basket Transaction expired. This gain or loss contained the tax consequences related to the Field Operations' adjustment, even though these consequences were labelled differently.

PROPOSED REGULATIONS CLARIFY THE DEFINITION OF "REAL PROPERTY" UNDER THE REIT RULES

On May 14, 2014, the U.S. Treasury Department published proposed regulations (the "Proposed Regulations") clarifying the definition of "real property" under the real estate investment trust (REIT) rules.[7] The issuance of the Proposed Regulations follows an IRS moratorium on issuing private letter rulings (PLRs) with respect to REITs[8],during which time the IRS analyzed whether recent PLRs[9] 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"))[10] 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.[11]

IRS ADDRESSES INFORMATION REPORTING REQUIREMENTS FOR BANK'S FEE CREDIT PROGRAMS

In the banking context, the IRS recently issued a private letter ruling addressing the information reporting obligations for a bank's fee credit programs. The taxpayer, a bank, set up two fee credit programs for its commercial customers, such as commercial account holders and tax exempt recipients. Under the fee credit programs, the bank's customers could receive an allowance, (*i.e.*, a "fee credit") in lieu of interest on deposits, which could then be used to offset certain fees for banking services.

Under the first program, excess or unused fee credits, although not paid out to customers in cash, could be used by the bank's customers to pay for banking services provided by third-party vendors, such as armored car services, courier services, check supplies, and lock boxes. Under the second program, the fee credits could only be used to offset banking services up to a set limit. In contrast to the first program, the bank actually paid its customers interest on any unused account balance not required to offset fees. The bank requested the private letter ruling from the IRS to determine the extent, if any, to which its fee credit programs would give rise to information reporting obligations under the Internal Revenue Code.

To determine whether the fee credit programs gave rise to a reporting obligation, the IRS analyzed whether the customers' deposits with the Bank were subject to the below-market loan rules under section 7872, such that interest income should be imputed to the bank's customers. To short circuit a panoply of complicated rules, suffice it to say that although the deposits were subject to section 7872, because the bank provided banking services to its customers through the use of bank fee credits in lieu of paying interest on the deposits, the deposits did not generate imputed interest thanks, in part, to an exception in the section 7872 rules for loans, which have "no significant effect on any Federal tax liability of the lender or the borrower." In

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this case, there was no significant tax effect because, as far as the bank was concerned, the items of income and deduction would offset each other, and the imputed interest income received by customers would be offset by a deduction for the bank fees and charges that are reduced by the fee credits.

You might be wondering how all of this relates to information reporting under the tax law. Well, because the bank's below-market loans (read: deposits) qualified for the exception to the imputed interest requirement under section 7872, the loans wouldn't generate reportable interest, except, of course, to the extent interest was actually paid in cash. Thus, there was no reportable interest under section 6049 or other reportable income under section 6041. However, the IRS distinguished fee credits used to pay third-party vendors selected and contracted directly by the bank's customers because the bank wasn't directly or indirectly providing any services — one of the requirements for compensation-related loans under section 7872. Consequently, neither the imputed interest rules, nor any of their exceptions, would apply to those fee credits, and those fee credits would generate reportable interest income.

BITCOIN NOT REPORTABLE ON 2013 FBARS

Earlier this year, the IRS issued guidance on virtual currency, finding that such currencies (including, for example, Bitcoin) are property for U.S. tax purposes and are generally not subject to the rules governing foreign currency.[12] While this guidance was an important first step for helping taxpayers that hold virtual currencies comply with their tax obligations, many questions on the taxation of virtual currencies remain unanswered.

For example, until recently, it was unclear whether taxpayers that held virtual currencies would have to report their virtual currency holdings on FinCEN Form 114, Report of Foreign Bank and Financial Accounts (commonly known as an "FBAR"). During a webinar on June 4, Rod Lundquist, a senior program analyst for the Small Business/Self-Employed Division of the IRS, clarified that, at this time, taxpayers do not need to report virtual currencies on FBARs for 2013. However, Lundquist cautioned that requirements for virtual currency reporting could change as the IRS continues to closely monitor developments on virtual currencies.

For now, the IRS appears to be addressing the tax treatment of Bitcoin and other virtual currency one topic at a time. Tax Talk will continue to monitor IRS guidance on virtual currency as it is handed down.

IRS MAKES MODIFICATIONS TO VOLUNTARY DISCLOSURE PROGRAM

On June 18, 2014, the IRS announced significant changes to its offshore compliance programs in order to provide a new avenue for thousands of people to become compliant with their U.S. tax obligations. The changes include an expansion of the IRS's streamlined filing compliance procedures and modifications to the offshore voluntary disclosure program (OVDP).

The streamlined filing compliance procedures are available to individual taxpayers that certify that the failure to report all income, pay all tax, and submit all required information returns (including FBARs) was due to non-willful conduct. The streamlined filing compliance procedures (introduced in 2012) were initially available only to U.S. taxpayers who did not reside in the United States (for example, U.S. citizens living abroad). The changes announced by the IRS now provide a way for U.S. taxpayers who reside in the U.S. to take advantage of the streamlined filing compliance procedures. Additionally, the IRS eliminated an earlier requirement that the taxpayer have $1,500 or less of unpaid tax per year. Under the revised procedures, U.S. taxpayers residing outside the United States who qualify for the streamlined filing compliance procedures will not have to pay penalties. U.S. taxpayers residing within the United States will have to pay a "miscellaneous offshore penalty" equal to 5% of the foreign financial assets that gave rise to the tax compliance issue.

Taxpayers who are not eligible for the streamlined filing compliance procedures may be eligible for the OVDP. The OVDP was established in 2009 as a way for taxpayers to voluntary disclose previously undisclosed foreign accounts and assets to the IRS, pay a penalty, and become compliant with U.S. tax laws while avoiding criminal prosecution and limiting exposure to civil penalties. The 2009 and 2011 OVDPs required taxpayers to come forward by a particular deadline; in 2012, the IRS initiated an ongoing OVDP that continues today. In addition to the changes to the streamlined filing compliance procedures, the IRS made changes to the OVDP, requiring additional information from taxpayers applying to the program and eliminating the reduced penalty percentage for non-willful taxpayers (to take into account the revised streamlined filing compliance procedures). Additionally, the penalties under the OVDP are increased from 27.5% to 50% if the taxpayer holds an account at a foreign financial institution publicly identified as under investigation by the IRS or Department of Justice.

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These changes to the streamlined filing compliance procedures and the OVDP are the carrot that the IRS is using to bring delinquent U.S. taxpayers into compliance. The stick? As noted previously, beginning July 1, 2014, thousands of foreign financial institutions are beginning to report their U.S. accounts to the IRS as part of FATCA, and, if the IRS initiates an audit against a taxpayer, neither the streamlined filing compliance procedures nor the OVDP will be available to the taxpayer.

IRS APPLIES SECTION 956 ANTI-ABUSE RULE

On May 16, 2014, the IRS released Chief Counsel Advice 201420017 relating to the application of the Section 956 anti-abuse rule under Treasury Regulation Section 1.956-1T(b)(4). The facts of the Chief Counsel Advice are complicated. In brief, a U.S. parent held several controlled foreign corporations (each a CFC). One CFC was a partner ("CFC Partner 1") in a foreign partnership (FPS), which held a foreign disregarded entity (DE) that served as an internal finance company for the group. Several other CFCs from the group were also partners in FPS.

CFC Partner 1 had limited earnings and profits. FPS made a loan ("FPS Loan") to CFC Partner 1 via DE and CFC Partner 1 in turn made a loan ("CFC Partner 1 Loan") to U.S. parent. U.S. parent included amounts in income under Sections 951(a)(1)(B) and 956 as a result of CFC Partner 1 Loan.

The issue was whether U.S. parent must include amounts in income under Sections 951(a)(1)(B) and 956 as a result of the FPS Loan. Treasury Regulation Section 1.956-1T(b)(4) provides that:

> a controlled foreign corporation will be considered to hold indirectly... investments in U.S. property acquired by any other foreign corporation that is controlled by the controlled foreign corporation, if one of the principal purposes for creating, organizing, or funding (through capital contributions or debt) such other foreign corporation is to avoid the application of section 956 with respect to the controlled foreign corporation. For purposes of this paragraph (b), a foreign corporation will be controlled by the controlled foreign corporation if the foreign corporation and the controlled foreign corporation are related parties under section 267(b). In determining for purposes of this paragraph (b) whether two or more corporations are members of the same controlled group under section 267(b)(3), a person is considered to own stock owned directly by such person, stock owned with the application of section 1563(e)(1), and stock owned with the application of section 267(c).

The IRS applied Treasury Regulation 1.956-1T(b)(4), and held in the affirmative. The IRS reasoned that the substantially lower inclusion reported by U.S. parent from the CFC Partner 1 Loan, as compared to the inclusion that U.S. parent would have had if DE had lent directly to U.S. parent, is strong evidence that one of the principal purposes of funding CFC Partner 1 was to avoid the application of Section 956 with respect to the other CFC partners.

MoFo in the News

On April 1, 2014, MoFo Partner Anna Pinedo participated in a GARP webcast titled "Volcker Rule Implementation." This webcast addressed many of the impacts of the final Volcker rule on banking institutions, including foreign banks. Aspects of the rule that were covered include: the exemption for proprietary trading; limitations on permitted trading and fund activities; fund investment and sponsorship; impact on foreign banking organizations; compliance programs; and the conformance period.

On April 2, 2014, MoFo Partners Peter Green and Jeremy Jennings-Mares spoke on a panel titled "Roundtable: Regulation in 2014/15." Topics of discussion include: Managing costs for implementing Dodd-Frank and the final Volcker Rule; How should Prospectus Directive III look? It's due in 2015; Clearing/reporting requirements in the U.S. and the UK; and the evolving impact of AIFMD.

On April 7, 2014, MoFo Partners Peter Green and Jeremy Jennings-Mares participated in an IFLR webcast titled "European Developments Affecting Structured Notes & Retail Investment Products." This webcast considered recent developments affecting structured notes and retail investment products in Europe. It focused on the progress of the proposed PRIPS regulation in the EU and related regulatory developments including MiFID II and the ongoing debate between legislators, regulators, and market participants to the suitability of certain complex products for retail investors.

On April 7, 2014, MoFo Partners Jay Baris, Anna Pinedo, and Remmelt Reigersman spoke on PLI's Teleconference - Business Development Companies: A Private Equity or a Volcker Solution? The speakers provided an overview of the basic requirements

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applicable to BDCs, explored BDCs as an alternative, and discussed advantages associated with BDCs.

On April 12, 2014, Partner Anna Pinedo participated in a speaking engagement titled "Hot Topics Under the JOBS Act of 2012." Chaired by former Federal Regulation of Securities Committee Chair and Edwards Wildman Palmer Partner Stanley Keller, the panel included Professor Joseph Grundfest, SEC Corp. Fin. Director Keith Higgins, former SEC Corp. Fin. Director Meredith B. Cross, and Anna Pinedo, chair of Committee's Subcommittee on the Annual Review of Securities Regulation, and a partner at Morrison & Foerster, LLP.

On April 25, 2014, MoFo Senior Of Counsel Jerry Marlatt, Of Counsel Bradley Berman, and Partner Lloyd Harmetz spoke at a teleconference titled "Bank Financings: Commercial Paper and Certificate of Deposit Programs." This teleconference discussed how commercial paper and certificate of deposit programs remain popular financing methods used by banks. In this briefing, they discussed considerations relating to the establishment and operation of these two types of programs. Topics of discussion included: the legal framework for these programs; the documentation that is used; and practical advice for bank and broker-dealer personnel who handle issuances from these programs.

On April 29, 2014, MoFo Partners Peter Green, Oliver Ireland and Jeremy Jennings-Mares participated in a seminar titled "U.S. Regulatory Developments for Non-U.S. Banks." This seminar discussed how non-U.S. banks have been faced with the challenge of complying with regulations in their home countries, as well as complying with U.S. regulations, following the adoption of the Dodd-Frank Act.

On April 30, 2014, MoFo Partners Anna Pinedo, Jay Baris, and Remmelt Reigersman spoke at a seminar entitled "U.S. Regulatory Developments for Non-U.S. Banks." The seminar discussed how the market for offerings by business development companies, or BDCs, remains active.

On May 5-6, 2014, in a CFO-specific forum called "IMN's Real Estate CFO Forum," MoFo Tax Partner Michelle Jewett showcased the current tax issues and challenges real estate CFOs, treasurers, and controllers are encountering, and the strategies and tools they are employing to meet these challenges. Jewett spoke on the panel titled "Understanding and Complying with Regulatory Updates and Developments."

On May 8, 2014, MoFo Partners Anna Pinedo, David Lynn, and Marty Dunn participated in a seminar titled "Two and Two Together: JOBS Act and JOBS Act 2.0." The partners spoke on the fundamental changes that have developed in the IPO market and even more significant changes that have resulted in the private or exempt offering market since the adoption of the JOBS Act.

On May 12, 2014, Senior Of Counsel Jerry Marlatt and Of Counsel Bradley Berman participated in an IFLR webinar titled "Foreign Banks Raising Capital in the U.S." The webinar discussed foreign banks and how they are increasingly looking to diversify their financing options and how they can access U.S. investors without subjecting themselves to the securities registration requirements applicable to public offerings, or the ongoing disclosure and governance requirements applicable to U.S. reporting companies.

On May 14, 2014, Partners Anna Pinedo and Marty Dunn participated in a PLI webcast titled "JOBS Act Implementation Update." The partners spoke about the Securities & Exchange Commission and how it has adopted and proposed rules implementing much of the JOBS Act. They also discussed how SEC's staff guidance on the JOBS Act and market practice continues to evolve. Topics included: trends affecting IPOs by emerging growth companies; Rule 506 developments; and the proposed regulations for crowdfunding and Regulation A+ offerings.

On May 20, 2014, Tax Department Co-Chair Thomas Humphreys and Partner Remmelt Reigersman participated in a seminar titled "Alphabet Soup: MLPs, upREITs and up-Cs." The seminar discussed tax developments in recent years and how they have given corporate planners a wide range of new tools to structure a public company. For example, tax pass-through MLP and REIT structures are spreading into new asset classes. Also, traditional double-taxed "C" corporations are using tax pass-through entities, including REITs and partnerships, to reduce or eliminate entity-level taxes, as well as optimize their internal structures with tax "disregarded entities." These new tools lead to a variety of tax choices in deciding how to structure a public company.

On May 21, 2014, at the Morrison & Foerster London Seminar Series, Partners Jeremy Jennings-Mares and Barbara Mendelson discussed "Activities of Foreign (Non-U.S.) Banks in the United States." The partners provided a comprehensive overview of the regulatory and enforcement issues facing non-U.S. banks in the United States, including: the Fed's FBO rules; resolution plan requirements; anti-money laundering and other enforcement issues and trends; the Volcker Rule; and comparable European requirements. Concerning the topic of "Reconciling Compliance with Dodd-Frank's Title VII and EMIR," Partners Peter Green and Jeremy Jennings-Mares and Of Counsel James Schwartz discussed the similarities and differences between the

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U.S. and European approaches to derivatives regulation.

On June 4, 2014, Partners Marty Dunn and David Lynn participated in a speaking engagement titled “Global Capital Markets & the U.S. Securities Laws 2014: Raising Capital in an Evolving Regulatory Environment.” The partners spoke on keeping securities lawyers up-to-date on domestic and international regulatory and market developments, bringing together an engaging group of expert practitioners and senior regulators for an in-depth look at how the U.S. securities laws work in the context of a rapidly evolving global regulatory environment.

On June 11, 2014, Partner Anna Pinedo participated in a teleconference titled “Green Bonds and Other Impact Investing.” She discussed the market for Green Bonds and how it is growing as issuers of debt securities reach a broader investor audience seeking to promote sustainability and related initiatives. The session provided an overview of the green bond market, the considerations in structuring and offering green bonds, and the disclosure and reporting requirements. In addition, the speakers provided an overview of the Green Bond Principles. Pinedo added that the Green Bond Principles are best practices for issuances and outline an approach for designating, disclosing, managing, and reporting on the proceeds of a Green Bond.

On June 11, 2014, Partner Thomas A. Humphreys and Associate David J. Goett gave a presentation on FATCA to the New Jersey Society for Enrolled Agents. The presentation provided an overview of FATCA, including the background and history leading to its enactment, as well as the IRS’s Offshore Voluntary Disclosure Program.

On June 12, 2014, Of Counsel Bradley Berman and Partner Ze’-ev Eiger spoke during a webinar entitled “Debt Capital Markets in the United States: Regulatory Restrictions on Offering and Selling Debt Securities.” They discussed regulatory restrictions on offering and selling debt securities. Topics of discussion included: a brief overview of market activity; registered debt offerings and registration process; unregistered debt offerings; recent developments pertaining to various debt offering formats; documentation for various debt offering formats; listing and continuing obligations; and liability concerns.

On June 16, 2014, Partners Anna Pinedo and Jay Baris participated in a West LegalEdcenter webcast titled “Social Media for Banks and Financial Services Institutions.” The 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 June 24, 2014, Senior Of Counsels Kenneth Kohler and Jerry Marlatt spoke during a webinar titled “The Emerging Regulatory Landscape for U.S. Asset-Backed Securities.” They discussed the U.S. capital markets and how they continue to evolve, and while longstanding regulatory uncertainties are resolved, ABS and MBS issuers and investors are increasingly entering or considering entering these markets once again. Additionally, they discussed the years since the financial crisis and how they have brought sweeping changes in the rules affecting structured finance in the U.S., with more changes on the way. In this program, Kenneth and Jerry provided an overview of the principal U.S. regulatory and market developments for ABS and MBS issues in the US.

On June 26, 2014, Partners Michael Agoglia, Demme Doufekias, Thomas Noto, and Nancy Thomas participated in a webinar titled “Individual Liability: What’s Behind the Headlines?” The webinar discussed federal and state regulators and prosecutors and how they are increasingly targeting individuals at financial institutions for alleged violations of financial laws and regulations. The partners commented on regulators, prosecutors, and prominent judges in regard to how they have proclaimed that individuals must be held accountable.

On June 26-27, 2014, Of Counsel Bradley Berman and Partners Remmelt Reigersman, Anna Pinedo, and Lloyd Harmetz spoke during StructuredRetailProducts.com’s 3rd Annual North American Structured Products Conference.

On June 26-27, 2014, Tax Partner Michelle Jewett participated in IMN’s 11th Annual Non-Traded REIT Industry Symposium. Jewett addressed the critical issues impacting the different non-traded REIT stakeholders, including sponsors tax of Non-Traded REITs.

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1 Our May 8, 2014 client alert on Notice 2014-33 can be found at: http://media.mofo.com/files/Uploads/Images/140508-FATCA-Transition.pdf.

2 T.D. 9668, RIN 1454-BF96 (June 9, 2014).

3 CCA 201423019 (June 6, 2014).

4 Sheppard, “Inbound Mortgage Modifications Confound the IRS,” *Tax Notes, July 14, 2014, p. 105.*

5 See Rev. Rul. 91-46.

6 Basket options were the subject of a recent hearing held by the Senate Permanent Subcommittee on Investigations on July 22, 2014. See U.S. Senate Permanent Subcommittee on Investigation, “Abuse of Structured Financial Products: Misusing Basket Options to Avoid Taxes and Leverage Limits,” July 22, 2014.

7 (REG-150760-13).

8 For prior coverage, see http://media.mofo.com/files/Uploads/Images/130722-MoFo-Tax-Talk.pdf. The moratorium on issuing rulings ended in November 2013.

9 For example, the IRS had ruled favorably on REITS owning casinos, prisons, data centers, billboards, pipelines, cell-towers, and timber.

10 Treas. Reg. § 1.856-3(d).

11 For more information, see http://www.mofo.com/~/media/Files/ClientAlert/140516RealPropertyREITRules.pdf.

12 For a discussion of the IRS’s previous guidance on virtual currencies, see Tax Talk 6.1, at http://www.mofo.com/~/media/Files/Newsletter/140417TaxTalk.pdf.

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 11 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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