MORRISON & FOERSTER QUARTERLY NEWS

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TAXTALK

Authored and Edited By
Thomas A. Humphreys
Anna T. Pinedo
Stephen L. Feldman
Remmelt A. Reigersman
Shiukay Hung
David J. Goett
Alexander I. Birkenfeld
Nicole M. Humphrey
Brennan W. Young

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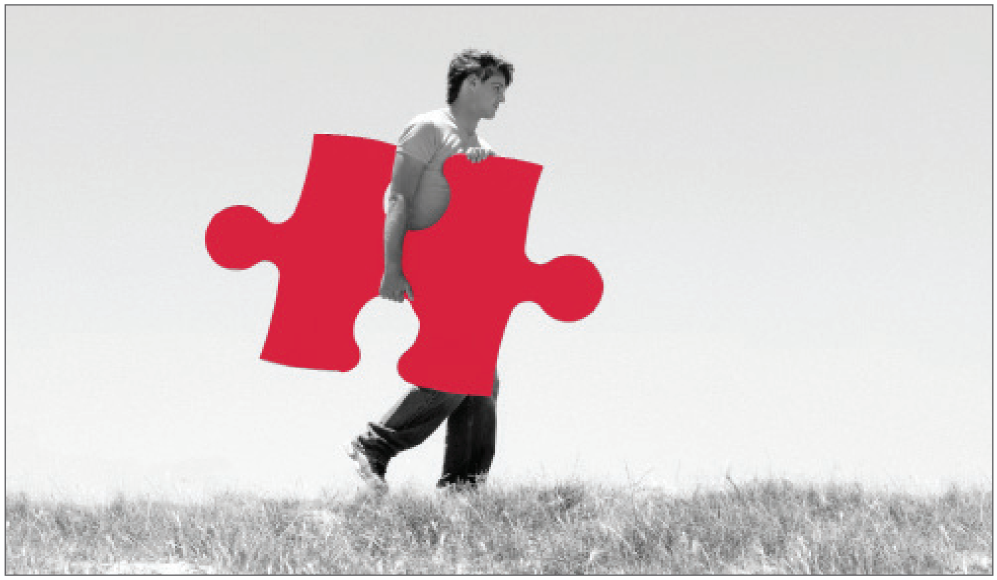
MORRISON FOERSTER



EDITOR’S NOTE

No one quite knows why, but in Q3 2015 the logjam broke on IRS guidance projects. Was it the September 17-19, 2015 ABA Tax section meeting in Chicago? Was it the IRS business plan? Was it the impending end of a presidential administration? We may never know. However, several sets of regulations/guidance were issued, and it’s going to take tax professionals some time to catch up.

First, the IRS issued proposed regulations addressing management fee waivers, and soon after, issued a notice regarding transfers of appreciated property to partnerships with foreign partners. Then, the IRS issued a notice and revenue procedure announcing that the agency would significantly limit the circumstances under which it would rule on spin-offs that are “cash-rich” or that involve REITs or RICs. Next, the IRS released final dividend equivalent regulations, which, among other things, create a new framework of “simple” and “complex” instruments. Finally, just one day later, the IRS extended certain FATCA effective dates, including the date withholding on gross proceeds will become effective.

Even things we had just digested by Q3’s end were not safe from this wave of guidance; on October 21, the IRS revoked the two basket notices (Notice 2015-47 and 2015-48) it had only recently issued[1] and replaced them with more (we hope) user-friendly Notice 2015-74 and Notice 2015-75. Tax Talk’s head is now officially spinning.

1 See Tax Talk Volume 8 Issue 2, available at http://www.mofo.com/~/media/Files/Newsletter/2015/08/150806TaxTalk.pdf.

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In addition to addressing all this new guidance, this issue of Tax Talk touches on recent news regarding a whistleblower's claim that money manager Vanguard has a substantial liability for transfer pricing transgressions, and also notes that the IRS has asked for public comments regarding IRS Form 8281.

FINAL AND TEMPORARY DIVIDEND EQUIVALENT REGULATIONS ISSUED – SOME GOOD, SOME BAD, AND SOME UGLY

On September 17, 2015, the Internal Revenue Service ("IRS") released final and temporary regulations under Section 871(m), the Internal Revenue Code provision that treats "dividend equivalents" paid under certain contracts as dividends from sources within the United States and therefore subject to U.S. withholding tax if paid to a non-U.S. person. The regulations finalize regulations proposed in 2013 (the "2013 Proposed Regulations"), with significant changes.

The new regulations generally adopt the "delta" approach introduced in the 2013 Proposed Regulations, which treat payments on notional principal contracts ("NPCs") and equity-linked instruments ("ELIs") as dividend equivalents if they have a delta above a threshold.[2] However, the delta approach is limited to "simple" NPCs and ELIs and a new framework has been designed for "complex" NPCs and ELIs. We discuss this and other significant changes to the 2013 Proposed Regulations below.

The new regulations generally apply to NPCs and ELIs issued on or after January 1, 2017. NPCs and ELIs issued on or after January 1, 2016, and before January 1, 2017, are also subject to the new regulations, with a delayed effective date of January 1, 2018.

Important highlights of the regulations include:

- ***Delta Threshold of 0.80***. The delta threshold has been increased to 0.80 from 0.70. Generally, if an NPC or ELI has a delta of 0.80 or greater, the NPC or ELI is a Section 871 transaction and payments on the instrument that reference dividends paid on a U.S. corporation's stock are "dividend equivalents" treated as U.S.-source dividends subject to withholding. However, "complex" NPCs and ELIs are subject to different rules, as further described below.

- ***Delta Determined Once***. The delta of an instrument is determined when the instrument is issued.[3] Delta is not re-tested when the instrument is acquired in the secondary market. This is a change from the 2013 Proposed Regulations, which required determining delta in the hands of each taxpayer on the relevant acquisition date.

- ***Delta Determined Using Hedge***. A taxpayer that issues an instrument that references a basket of 10 or more underlying securities and uses an exchange-traded security (e.g., an exchange-traded fund) that references substantially the same underlying securities to hedge the instrument at the time it is issued may calculate the delta of the instrument by determining the ratio of the change in fair market value of the instrument to the change in the fair market value of the hedge (rather than of each underlying security in the basket). A similar approach (i.e., substituting the hedge for the basket securities) applies in the case of a complex NPC or ELI.

- ***Estimated and Implicit Dividends Count***. The new regulations retain the provisions of the 2013 Proposed Regulations that include estimated and implicit dividends as dividend equivalents. For example, a "price return" only instrument can give rise to dividend equivalent payments if the expected dividends on the underlying security are taken into account in pricing the instrument or setting its terms.

- ***Qualified Index Exception***. Similar to the 2013 Proposed Regulations, instruments linked to "qualified indices" are carved out from the dividend equivalent rules. However, the definition of a qualified index has been modified.[4] Whether an index is a qualified index is determined on the first business day of each calendar year, and such determination applies for all relevant instruments issued during that year. In addition, an underlying security that tracks a qualified index (e.g., an exchange-traded fund) will be treated as a qualified index.

2 For a summary of the 2013 Proposed Regulations, please see our Client Alert, available at http://media.mofo.com/files/Uploads/Images/131212-IRS-Regulations.pdf.

3 The regulations clarify that, in the case of a contingent debt instrument or convertible debt instrument, the delta of the embedded derivative or of the convertible feature is determined separately from the delta of the overall debt instrument.

4 Under the new regulations, a qualified index means an index that (i) references 25 or more component securities; (ii) references only long positions in component securities; (iii) references no component underlying security that represents more than 15% of the weighting of the component securities in the index; (iv) references no five or fewer component underlying securities that together represent more than 40% of the weighting of the component securities in the index; (v) is modified or rebalanced only according to publicly stated, predefined criteria, which may require interpretation by the index provider or a board or committee responsible for maintaining the index; (vi) did not provide an annual dividend yield in the immediately preceding calendar year from component underlying securities that is greater than 1.5 times the annual dividend yield of the S&P 500 Index as reported for the immediately preceding calendar year; and (vii) is traded through futures contracts or option contracts on a national securities exchange or certain foreign exchanges.

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- ***Limited Partnership Look-Through***. For purposes of applying the Section 871(m) rules, an instrument that references a partnership interest is not treated as a potential Section 871(m) transaction, unless the partnership is a dealer or trader in securities for tax purposes, holds significant investments in securities,[5] or directly or indirectly holds an interest in a lower-tier partnership that engages in those activities.

- ***Combined Transactions***. The regulations mostly retain the rules included in the 2013 Proposed Regulations that two or more transactions may be treated as a single transaction in determining whether Section 871(m) should apply. However, to address challenges that brokers acting as short parties may have in determining whether multiple transactions should be combined, the regulations provide that brokers may generally rely on two presumptions. They may presume that transactions are not entered into in connection with each other if the long party holds the transactions in separate accounts and they may presume that transactions entered into two or more business days apart are not entered into in connection with each other (unless the brokers have knowledge to the contrary).

- ***Complex vs. Simple***. Complex NPCs and ELIs[6] are not subject to the "delta" test; instead, a complex NPC or ELI gives rise to dividend equivalents if it passes a "substantial equivalence" test. Generally, the substantial equivalence test calculates the difference between the change in value of the complex contract (determined at various "testing prices" of the underlying) and the change in value of a number of shares that fully hedges the complex contract, as determined on the issue date. The differences are then given a probability-weighted average over the various testing prices of the underlying (the "Complex Contract Calculation"). A similar process is repeated with a "simple contract benchmark"[7] in place of the complex contract (the "Benchmark Calculation"). If the Complex Contract Calculation is less than or equal to the Benchmark Calculation, the complex contract is a Section 871 transaction. The IRS has requested comments regarding the administrability of the substantial equivalence test.

Select observations:

- The regulations make a few notable improvements to the 2013 Proposed Regulations, in particular increasing the delta threshold to 0.80 and allowing for the delta of a particular instrument to be determined once.

- Consistent with the 2013 Proposed Regulations, estimated and implicit dividends are not carved out and, since most price-return-only instruments take into account expected dividends on the underlyings, the regulations apply to price return only instruments.

- Since the determination of whether an index is "qualified" is made on the first business day of a calendar year and applies for the entire year, a published list (updated annually) of all qualified indices for purposes of Section 871(m) would be helpful. Who will take that publication on?

- The delta test or the substantial equivalence test, as applicable, needs to be conducted when the relevant instrument is issued. An instrument is issued at "inception" or upon "original issuance." Disclosure documents for instruments addressing the tax treatment are typically prepared on or immediately after the pricing date. Can the determination be made on the pricing date and included in the disclosure documents? The preamble to the regulations indicates that "an instrument is treated as "issued" when it is entered into, purchased, or otherwise acquired at its inception or original issuance."

- Many structured products will be considered "complex." The rules for determining whether a complex NPC or ELI gives rise to a Section 871(m) transaction seem rather complex, and time will tell whether the framework is workable in practice. Those rules are part of the temporary regulations and the IRS has requested comments regarding the administrability before it will finalize them.

NEW IRS GUIDANCE LIMITS TAX-FREE SPIN-OFF RULINGS — IMPLICATIONS FOR REIT SPIN-OFFS

On September 14, 2015, the IRS issued Notice 2015-59 (the "Notice") and Revenue Procedure 2015-43 (the "Rev Proc"; together with the Notice, the "Spin-Off Guidance"). Under the Spin-Off Guidance, the IRS has significantly limited the circumstances under which it will issue a private letter ruling with respect

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5 A partnership holds significant investment in securities if either (i) 25% or more of the value of the partnership's assets consist of securities that could give rise to U.S.-source dividends or that are potential Section 871(m) transactions, or (ii) the value of such securities or transactions equals or exceeds $25 million.

6 A complex NPC or ELI is any NPC or ELI that is not a simple contract; a simple contract is an NPC or ELI that has a fixed term and references a fixed number of underlying shares.

7 A simple contract benchmark is a "comparable simple contract" that has a delta of 0.8, references the same underlying security as the complex contract, and has the same maturity as the complex contract. Examples of simple contract benchmarks are put options, call options, or collars on a fixed number of shares.

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to spin-off or split-off transactions that are considered "cash-rich" or that involve real estate investment trusts ("REITs") or regulated investment companies ("RICs"). Although the Spin-Off Guidance does not change the law that currently applies to spin-off transactions, it will nevertheless be a significant consideration for any company contemplating such a transaction. The Spin-Off Guidance not only eliminates the certainty of an IRS ruling for transactions within its ambit, but also indicates a potential heightened risk of an IRS challenge under current law, as well as the prospect of future changes to the applicable rules.

In the Notice, the IRS states that it is studying issues regarding the tax-free qualification of spin-offs with one or more of the following characteristics: (1) ownership by the distributing corporation ("Distributing") or controlled corporation ("Controlled") of a substantial amount of "Investment Assets" (which generally includes cash, stock, securities, and similar assets and should be determined by their fair market value) when compared to (i) its total assets or (ii) the assets that it relies on to satisfy the "five-year active trade or business" requirement of the tax-free spin-off rules ("Business Assets"); (2) a significant difference between Distributing's ratio of Investment Assets to non-Investment Assets and such ratio of Controlled; (3) ownership by Distributing or Controlled of a small amount of Business Assets compared to its total assets; and (4) election by Distributing or Controlled (but not both) to be a REIT or a RIC.

Under the Rev Proc, the IRS ordinarily will not issue rulings on the following issues unless the taxpayer can demonstrate "unique and compelling" reasons to justify the rulings: (1) any issue relating to the tax-free treatment of a distribution (or series of distributions) if Distributing or Controlled becomes a RIC or REIT (or contributes properties to a RIC or REIT) in connection with the distribution; and (2) any issue relating to the tax-free treatment of a distribution (or series of distributions) if, immediately after the distribution, the fair market value of the Business Assets of Distributing or Controlled is less than 5% of the fair market value of its total gross assets. The IRS will take into account all of the facts and circumstances in evaluating whether there exists a "unique and compelling" reason to justify a ruling where the 5% standard is not met. In that regard, the Notice specifically cites situations in which a substantial portion of a corporation's assets would qualify as Business Assets but for the lack of a five-year business history, and where the Business Assets involved, though not satisfying the 5% standard, bear a particular relationship to the business purpose for the distribution.

In addition, the IRS temporarily will not issue rulings on the following issue because the area is under study: any issue relating to the tax-free treatment of a distribution (or series of distributions) if, immediately after the distribution, all of the following conditions exist: (i) the fair market value of the Investment Assets of Distributing or Controlled is two-thirds or more of the fair market value of its total gross assets; (ii) the fair market value of the Business Assets of Distributing or Controlled is less than 10% of the fair market value of its Investment Assets; and (iii) the ratio of the fair market value of Investment Assets to the fair market value of non-Investment Assets of Distributing or Controlled is three times or more than the ratio of the other corporation.

The Rev Proc is effective for all ruling requests that are postmarked or, if not mailed, received on or after September 14, 2015.[8]

PROPOSED TREASURY REGULATIONS ADDRESSING DISGUISED PAYMENTS FOR SERVICES FOCUS ON MANAGEMENT FEE WAIVERS

On July 22, 2015, the IRS and the Treasury Department issued proposed regulations (REG-115452-14) under Section 707(a)(2)(A)[9] of the Internal Revenue Code of 1986 (the "Code"). The primary purpose of the Proposed Regulations is to distinguish between situations in which partnership interests granted in connection with a "management fee waiver" should be treated as taxable compensation for the performance of services, rather than as nontaxable "profits interests" in the partnership.

Section 1.707-2(c) of the Proposed Regulations provides a non-exclusive list of six factors, the most important of which is a lack of "significant entrepreneurial risk," for the purported partner that may indicate an arrangement constitutes a payment for services. The Proposed Regulations presume an arrangement lacks significant entrepreneurial risk if any of the following facts and circumstances apply (the "Risk Factors"):

1. Capped allocations of partnership income where the cap is reasonably expected to apply;

8 For a more detailed analysis of the Spin-Off Guidance, please see our Client Alert, available at: http://www.mofo.com/~/media/Files/ClientAlert/2015/09/150917NewIRSGuidance.pdf.

9 Section 707(a)(2)(A) provides that if a partner performs services for a partnership and receives a direct or indirect allocation and distribution, and if the performance of services together with the allocation and distribution are properly treated as a transaction occurring between the partnership and a partner acting other than in its capacity as a partner, then the transaction will be treated as occurring between the partnership and one who is not a partner.

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2. An allocation in which the service provider's share of income is reasonably certain;
3. An allocation of gross income;
4. An allocation that is predominantly fixed in amount, is reasonably determinable or is designed so that sufficient net profits are highly likely to be available to make the allocation to the service provider; or
5. An arrangement in which a service provider waives its right to receive payment for the future performance of services in a manner that is non-binding or fails to timely notify the partnership and its partners of the waiver and its terms.

The other five factors include:

1. The service provider holds a transitory partnership interest or holds a partnership interest for a short duration;
2. The service provider receives an allocation and distribution in the same timeframe that a non-partner service provider would receive payment;
3. The service provider becomes a partner primarily to obtain tax benefits;
4. The value of the service provider's interest in continuing partnership profits is small compared to the allocation and distribution; and
5. The arrangement provides for different allocations or distributions for different services received, the services are provided by one person or by related persons, and the terms of the allocations or distributions are subject to levels of entrepreneurial risk that vary significantly.

In addition, in the preamble to the Proposed Regulations, the IRS and Treasury Department announced their intention to remove interests received in exchange for waived fees from an existing safe harbor in Revenue Procedure 93-27, under which the receipt of certain interests are treated as "profits interests" that are not currently taxable. Thus, the preamble asserts that the safe harbor will not apply to management fee waiver arrangements in which an investment manager that provides services to a fund in exchange for a fee waives that fee in exchange for the issuance, to an affiliate of the investment manager, of an interest in future partnership profits calculated by reference to the amount of the waived management fees. The preamble notes that the safe harbor is inapplicable in such instances because (i) such transactions do not satisfy the requirement that receipt of a profits interest be for the provision of services to or for the benefit of the partnership in a partner capacity or in anticipation of being a partner, and (ii) the service provider would effectively have disposed of the partnership interest (through a constructive transfer to the related party) within two years of receipt.

Lastly, the IRS and the Treasury Department plan to issue a revenue procedure providing an additional exception to the safe harbor in Revenue Procedure 93-27. The new exception is expected to apply to a profits interest issued in conjunction with a partner foregoing payment of an amount that is substantially fixed for the performance of services. The preamble also indicates that the IRS intends to: (i) amend provisions of existing regulations that are inconsistent with the Proposed Regulations, including as to the general treatment of certain amounts as guaranteed payments; and (ii) consider other related issues, including certain issues related to "targeted" capital accounts.[10]

IRS ISSUES NOTICE ANNOUNCING INTENTION TO REQUIRE GAIN RECOGNITION ON CERTAIN TRANSFERS OF PROPERTY TO PARTNERSHIPS WITH RELATED FOREIGN PARTNERS

On August 6, 2015, the IRS and the Treasury Department announced their intention in Notice 2015-54 (the "Notice") to issue regulations (the "Future Regulations") under Sections 721(c), 482, and 6662 of the Internal Revenue Code (the "Code") to address certain partnership transactions involving a partnership (domestic or foreign) between a U.S. taxpayer and a related foreign partner that are designed to shift income or gain to the foreign partner. The Notice addresses transactions where a U.S. taxpayer contributes appreciated property to a partnership that adopts Section 704(c) methods, special allocations, and/or inappropriate valuation techniques to shift gain or income to related foreign partners. The Future Regulations will generally deny non-recognition treatment for a contribution by a U.S. taxpayer of appreciated property to a partnership with a foreign affiliate unless the parties comply with the Gain Deferral Method, which is a method designed to ensure that any built-in gain will be recognized by the contributing partner.

10 For a more detailed analysis of the Proposed Regulations, please see our Client Alert, available at: http://www.mofo.com/~/media/Files/ClientAlert/2015/07/150730ManagementFeeWaivers.pdf.

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The Gain Deferral Method has the following five requirements:

1. The partnership must adopt the remedial allocation method under Section 704(c);
2. During any taxable year in which there is remaining built-in gain with respect to the contributed property, the partnership must allocate all items of Section 704(b) income, gain, loss, and deduction with respect to that property in the same proportion;
3. Certain additional reporting requirements must be satisfied. In addition, U.S. transferors must extend the statute of limitations with respect to all property to which the Future Regulations apply through the close of the eighth full taxable year following the contribution;
4. The U.S. transferor must recognize the built-in gain with respect to the contributed property upon an "Acceleration Event" (defined as any transaction that either would reduce or could defer the amount of remaining Built-In Gain that a U.S. contributor would recognize under the Gain Deferral Method if the transaction had not occurred); and
5. The Gain Deferral Method must be adopted for all appreciated property subsequently contributed to the partnership by the U.S. transferor and all related persons until the earlier of: (i) the date that no built-in gain remains with respect to any contributed property, or (ii) the date that is 60 months after the initial contribution of the built-in gain property.

The Future Regulations are proposed to apply to transfers occurring on or after August 6, 2015, and to transfers occurring before August 6, 2015, resulting from entity classification elections made under Treasury Regulation Section 301.7701-3 that are filed on or after August 6, 2015, and that are effective on or before August 6, 2015. The reporting requirements are proposed to apply to transfers and controlled transactions occurring on or after the date of publication of the Future Regulations.[11]

IRS ISSUES NOTICE EXTENDING CERTAIN FATCA EFFECTIVE DATES

On September 18, 2015, the U.S. Treasury Department (the "Treasury") and the Internal Revenue Service (the "IRS") issued Notice 2015-66, announcing their intention to amend the Foreign Account Tax Compliance Act ("FATCA") regulations to extend the period of time that certain transition rules will apply and to modify the rules regarding grandfathered obligations with respect to collateral.

The amendments will extend the date that withholding on gross proceeds and foreign passthru payments will begin. Under the current regulations, withholding on gross proceeds from the sale or other disposition of property of a type that can produce interest or dividends is set to begin on January 1, 2017. The Treasury and the IRS intend to extend the date that withholding on such gross proceeds will begin until January 1, 2019. Similarly, withholding on foreign passthru payments was set to begin on the later of January 1, 2017 and the date of publication of the final regulations defining the term "foreign passthru payment." The Treasury and the IRS intend to extend the date to the later of January 1, 2019 and the date of publication of the final regulations defining the term "foreign passthru payment."

The amendments will also extend certain other deadlines for compliance with FATCA. The statuses of limited foreign financial institution ("FFI") and limited branches will now terminate on January 1, 2017 instead of January 1, 2016. After December 31, 2015, limited FFIs and limited branches will be required to edit and resubmit their registrations to continue such status during 2016. The amendments will also extend the date by which sponsoring entities must register their sponsored registered deemed-compliant FFIs and sponsored direct reporting nonfinancial foreign entities ("NFFEs") to January 1, 2017. Withholding agents can continue to rely on withholding certificates from sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs that have only the sponsoring entity's GIIN (Global Intermediary Identification Number) for payments made prior to January 1, 2017. Furthermore, the Treasury and the IRS will treat FFIs covered by an intergovernmental agreement as complying with FATCA even if the partner jurisdiction has not exchanged 2014 information by the deadline of September 30, 2015, so long as the partner jurisdiction notifies the U.S. authority of the delay and makes a good faith effort to exchange the information promptly.

Finally, the amendments modify the rules regarding grandfathered obligations with respect to collateral. Under the pro rata rule, secured parties making payments from collateral to payees had to withhold a portion of the payment based on the non-grandfathered portion of the total collateral. Commenters noted that this rule was burdensome to secured parties. The Treasury and IRS now intend to allow secured parties to choose to withhold on all payments made with respect to

11 For a more detailed analysis of the Notice, please see our Client Alert, available at: http://www.mofo.com/~/media/Files/ClientAlert/2015/08/150825IRSIssuesNotice.pdf.

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collateral rather than apply the pro rata rule. The notice also clarifies that to the extent a secured party is treated as the beneficial owner of a grandfathered obligation pledged as collateral, the substitute payments made with respect to that grandfathered obligation will not be subject to withholding under FATCA.

NEW NOTICES FOR "BASKET CONTRACTS" REVOKE AND REPLACE JULY NOTICES

On October 21, the IRS issued Notice 2015-73 and Notice 2015-74 (together, "the New Notices"), which revoked Notice 2015-47 and Notice 2015-48 (together, "the Old Notices"), respectively, and replaced them with new guidance. The New Notices narrow the reach of the Old Notices in a number of ways, the highlights of which are discussed below.

First, the Old Notices found a basket contract when the taxpayer or its 'designee' had the right to alter a basket, without describing what would constitute a taxpayer's designee. This left taxpayers to wonder whether an index like the Dow Jones Industrial Average, which can change its components at any time, could involve a taxpayer's designee. The New Notices now describe three situations in which a person can be a taxpayer's 'designee': if the person is (1) the taxpayer's agent under principles of agency law; (2) compensated by the taxpayer for suggesting, requesting, or determining changes in the assets in the reference basket or the trading algorithm; or (3) selected by the taxpayer to suggest, request, or determine changes in the assets in the reference basket or the trading algorithm. The New Notices do provide some important exceptions, stating that a person will not be treated as compensated or selected by the taxpayer as a result of: (a) the person's position as an investment advisor, officer, or employee of an entity when that entity's publicly offered securities are included in the reference basket; or (b) the person's authority to suggest, request, or determine changes in the assets included in a widely used and publicly quoted index that is based on objective information or an index that tracks a broad market or a market segment.

Second, the Old Notices used a broad concept of taxpayer discretion to identify a basket contract, potentially encompassing any basket that could be changed after its initial issuance. Since the description of many indices such as the S&P 500 include the option for an advisory committee to adjust the composition of the index if a significant event happens to some of the securities, the Old Notices had the potential to treat some indices as basket contracts that were outside of the stated scope of the rules. The New Notices correct this overreach by specifically stating that a taxpayer will not be treated as having the discretion to alter a basket if the taxpayer has the authority to make an adjustment to respond to an unanticipated event outside of the taxpayer's control, like a merger, stock split, listing or delisting, nationalization, or insolvency of a component of a basket, a disruption in the financial markets for specific assets or in a particular jurisdiction, regulatory compliance requirement, force majeure, or any other unanticipated event of similar magnitude and significance.

The effective date for the basket contract rules is unchanged: the New Notices maintain the requirement from the Old Notices that a taxpayer must disclose transactions entered into on or after November 2, 2006, and in effect on or after January 1, 2011. Originally the New Notices could be read to exclude many contracts if taxpayers' returns from 2015 and onward did not reflect a benefit from those transactions. On November 2, however, the IRS amended the New Notices to eliminate that potential exclusion.

At the very least, participants and their material advisors have an extension on any disclosure that might be required, since the deadline for material advisor disclosure under the Old Notices was approaching at the end of October; the release of New Notices refreshes the grace period.

PROFESSOR BACKS WHISTLEBLOWER'S CLAIM THAT VANGUARD HAS SIGNIFICANT TAX LIABILITY FOR TRANSFER PRICING TRANSGRESSIONS

Professor Reuven Avi-Yonah of the University of Michigan Law School concluded in a report filed with the IRS and the SEC that the Vanguard Group, Inc. ("Vanguard") owes taxes, penalties, and fees of approximately $34.6 billion. Prof. Avi-Yonah filed the report at the request of a former Vanguard attorney turned whistleblower who alleges that Vanguard has not properly reported its tax liability.

According to Prof. Avi-Yonah's report, Vanguard, which is owned by the investment funds that it advises (the "Funds"), has been charging the Funds for investment management and advisory services at cost. Prof. Avi-Yonah is of the opinion that, under the IRS's transfer pricing regulations, Vanguard should have charged the Funds an arm's-length price for its services.

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In addition, according to the report, Vanguard was receiving payments from the Funds for a contingency reserve under Vanguard's control. Prof. Avi-Yonah opines that Vanguard owes an additional $210 million because it should have reported as taxable income the contingency reserve payments it received from the Funds.

Executives at Vanguard reviewed a copy of the report, and company spokesman John Woerth wrote, "[a]s we've stated previously, we believe the case is without merit and decline to comment further."

IRS Has Asked for Public Comments on Form 8281

The IRS has requested comments concerning Form 8281 (Information Return for Publicity Offered Original Issue Discount Instructions). The IRS will consider comments it receives by October 26, 2015.

Race for Chair of House Ways and Means Committee

On October 29, former House Ways and Means Chairman Paul Ryan (R-Wis.) was elected Speaker of the House, and two Republicans have made it known that they will be competing for his prior position.[12] The two leading contenders are Kevin Brady (R-Texas), who chairs the Ways and Means Health Subcommittee, and Patrick J. Tiberi (R-Ohio), who chairs the Ways and Means Trade Subcommittee. The decision will be made by the House Republican Steering Committee.

MOFO IN THE NEWS; AWARDS

In 2015, MoFo was named Americas Firm of the Year at GlobalCapital's Americas Derivatives Awards. GlobalCapital also shortlisted us for Global Firm of the Year and European Firm of the Year at the 2015 Global Derivatives Awards. myCorporateResource.com awarded MoFo with the 2015 Client Content Law Firm of the Year Award in recognition of law firms that produce world-beating, client-facing content.

2015 FMA Treasury and Capital Markets Legal and Legislative Issues Conference – October 22-23, 2015
Speaking Engagement – Barbara Mendelson

Partner Barbara Mendelson moderated the General Counsels panel on the first day of the 2015 FMA Treasury and Capital Markets Legal and Legislative Issues conference in Washington, D.C. The panel, which consisted of high-ranking general counsels from government agencies such as FINRA, the Commodity Futures Trading Commission, the SEC, the Federal Reserve Board and the FDIC, among other organizations, discussed key regulatory and supervisory issues and provided updates on enforcement developments and priorities. The conference served to share information, ideas and experiences on current hot topic regulatory and legislative initiatives with banking/securities attorneys, senior compliance officers, risk managers, internal auditors and regulators where the focus was on high-level discussion of evolving banking and securities law, enforcement proceedings, financial holding company issues, securities underwriting and distribution, and public finance.

The Cross-Border Private Placement Market; New Trends; New Issuers – October 21, 2015
Webinar – Ze'-ev Eiger

Partner Ze'-ev Eiger led a webinar regarding a number of important considerations for foreign issuers, including ongoing securities reporting and disclosure requirements. Topics covered included: benefits available to foreign private issuers (FPIs); confidential submissions and the SEC registration process; accounting considerations; corporate governance considerations; ongoing SEC reporting obligations; specialized disclosure requirements; and liability concerns. This webinar was hosted in conjunction with West LegalEdcenter.

How to Do an IPO – October 21, 2015
Speaking Engagement – Anna Pinedo

Partner Anna Pinedo served as the event kickoff speaker on the first panel of the conference. The program provided invaluable, in-depth information regarding crucial processes, including; IPO origination, the underwriting process, ethics issues that arise in IPOs, and corporate governance in IPOs and selected regulatory considerations. Specific topics covered included: how to get an issuer organized for an IPO; what issues to take to the SEC before filing; what forms and models to use; how the confidential filing process works; selected securities law issues, including the Securities Act of 1933, the JOBS Act, Dodd Frank, Reg. S-K, and Reg. S-X; confidentiality requests; due diligence; and other selected developments and regulatory considerations, including regulatory filings, Investment Advisers Act compliance and SEC audits. This program was hosted at the New York City Bar Association.

Up-C IPO Tax Considerations – October 20, 2015
Teleconference –Thomas Humphreys and Remmelt Reigersman

Partners Thomas Humphreys and Remmelt Reigersman led a teleconference regarding when an "Up-C" structure might be appropriate for an IPO candidate and how such structures are most commonly implemented. The speakers explained the various economic and tax benefits associated with such structures, including

12 See Kaustuv Basu, Stephen K. Cooper and Kat Lucero, *Brady, Tiberi Begin Unofficial Battle For Ways and Means Chair*, Tax Analysts 2015-23640 (Oct. 26, 2015).

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an in-depth explanation of the key terms of the "Tax Receivable Agreement" that is typically entered into by the selling shareholders and the public company.

The Cross-Border Private Placement Market; New Trends; New Issuers – October 14, 2015
Webinar – Brian Bates and Scott Ashton

Partner Brian Bates and Of Counsel Scott Ashton spoke on a panel regarding the cross-border private placement market which has continued to grow and has provided non-US issuers with an opportunity to raise capital from US and European financial institutions. Topics covered included: the global private placement market and recent trends, market participants, documentation requirements for traditional and structured transactions, financial covenants, "MFLs" and model form provisions, new issuers using the market (social housing trusts, universities, investment trusts, etc), marketing process with Agented and "direct" Private Placements, and ratings and the NAIC. This webinar was hosted in conjunction with the International Financial Law Review.

Raising More Capital Through a Regulation A+ Offering – October 8, 2015
Webinar – Anna Pinedo

Partner Anna Pinedo led a webinar that covered new opportunities to use Regulation A to raise capital or increase liquidity now that the Securities and Exchange Commission has adopted final rules amending Regulation A. Pinedo focused especially on Tier 2 offerings, which permit an issuer to raise up to $50 million in proceeds. Topics covered included: eligibility requirements, preparation of disclosure materials, Regulation A as a precursor to an IPO, and obtaining a concurrent stock exchange listing. This webinar was hosted in conjunction with Command Financial and ShareVault.

Securitization: Risk Weightings and Risk Retention – Approaches in the EU and U.S. – October 7, 2015
Teleconference – Peter Green, Jeremy Jennings-Mares, Kenneth Kohler

Partner Peter Green, Partner Jeremy Jennings-Mares, and Senior Of Counsel Kenneth Kohler hosted a teleconference centered on recent developments in the securitization field. Topics included the Basel III framework, risk weightings of securitization, and the differences in approach between the EU and U.S.

NASDAQ Private Company Breakfast Seminar –October 6, 2015
Speaking Engagement – David Lynn and Anna Pinedo

Partners David Lynn and Anna Pinedo spoke on a panel focused on considerations for companies planning to remain private or deferring an eventual IPO. Topics included "Company and third-party tender offers for privately held stock", "Facilitating liquidity for existing securityholders," "Material nonpublic Information," "Valuations of privately held stock," and "Pre-IPO Private Placements."

Final G-SIB Surcharge – September 29, 2015
Teleconference – Oliver Ireland

Partner Oliver Ireland led a teleconference regarding the Federal Reserve Board's approval of a final rule in July 2015 to establish the criteria for identifying a Global Systemically Important Bank (or G-SIB). Topics included who is subject to the rule, the calculation of the capital surcharge and how the U.S. version differs from Basel III requirements, the impact of reliance on short-term wholesale funding on the surcharge, what the estimated surcharges will be, and how the surcharge and its calculation will likely impact capital-raising.

U.S. Regulatory Developments Affecting Canadian Banks – September 22, 2015
Seminar –Kenneth Kohler, Jerry Marlatt, Oliver Ireland, Julian Hammar, James Schwartz

MoFo Senior of Counsel Kenneth Kohler, Senior of Counsel Jerry Marlatt, Partner Oliver Ireland, Of Counsel Julian Hammar, and Of Counsel James Schwartz hosted a briefing session at the Fairmont Royal York Hotel in Toronto, Canada. Topics included "The Volcker Rule: Past the Compliance Date, but Not Over the Hump", "Securitization Related Developments", and an update on the derivatives market.

New Opportunities for Unregistered Securities Offerings - Today and Tomorrow – September 18, 2015
Speaking Engagement – Anna Pinedo

MoFo Partner Anna Pinedo spoke at the 2015 ABA Business Law Section Annual Meeting in Chicago, IL on day two of the conference. The event provided comprehensive business law programming, including CLE programs prepared and presented by practice-area experts, as well as topical sessions covering the latest business law issues.

Final SEC CEO Pay-Ratio Rule – September 10, 2015
Teleconference – David Lynn and Scott Lesmes

MoFo Partners David Lynn and Scott Lesmes hosted a discussion regarding the Securities and Exchange Commission's decision on August 5, 2015, in a 3-2 vote, to adopt a final CEO pay-ratio rule, which requires public companies to disclose the ratio of the compensation of its chief executive officer to the median compensation of

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its employees. Lynn and Lesmes provided insight into disclosure requirements, how to identify the median employee, and how to prepare for the new rule, among other topics.

Margin Rules for Uncleared Swaps: What You Need to Know in 2015 – July 30, 2015
Webinar – Julian Hammar

MoFo Of Counsel Julian Hammar provided an overview of the latest trends and best practices with respect to the Prudential Regulator's Proposed Margin Rules for Uncleared Swaps, as well as comparisons to rules proposed by the CFTC regarding margin for uncleared swaps that will apply to entities not otherwise subject to the Prudential Regulator's rules.

Understanding the Securities Laws Summer 2015 – July 23-24, 2015
Speaking Engagement– Anna Pinedo

MoFo Partner Anna Pinedo and Stuart Fishman of JPMorgan Chase & Co. led a session at the PLI New York Center entitled "Securities Act Exemptions/ Private Placements." Discussion topics included exempt securities versus exempt transactions; Regulation D and Regulation A offerings and changes resulting from the JOBS Act; and Regulation S offerings to "non-U.S. persons." among other topics.

Volcker Rule Compliance: Taking Stock on "Conformance Day" – July 21, 2015
Webinar – Henry Fields

MoFo Partner Henry Fields led a webinar on the date on which the general Volcker Rule conformance period expired. The purpose of the webinar was to help banking entities take stock of where they were on this watershed date, to consider appropriate enhancements or modifications to their programs, and to assess what continuing compliance efforts will be necessary in the future.

Proposed Uniform Fiduciary Standard: The Devil Is in the Details – July 16, 2015
Teleconference – Hillel Cohn and Jay Baris

MoFo Senior of Counsel Hillel Cohn and Partner Jay Baris examined the implications of the proposed fiduciary standard for advisors and broker-dealers. Topics included the DOL proposal for retirement accounts; recent statements from the SEC, FINRA's application of an elevated standard, and SIFMA's proposal for a "best interests" customer standard. Cohn and Baris closed the session by addressing: "Where do we go from here?"

Current Practices and Issues for Foreign Broker-Dealers Under Rule 15a-6 – July 14, 2015
Teleconference – Hillel Cohn

MoFo Senior Of Counsel Hillel Cohn presented on current market trends, practices, and issues for Foreign Broker Dealers in the age of Rule 15a-6. The session covered numerous topics, including a summary of Rule 15a-6 requirements and recent 15a-6 enforcement cases. Cohn provided detailed answers on what constitutes "solicitation" of U.S. customers, and what the risks/ responsibilities are of the U.S. chaperoning broker. Finally, Cohn covered the impact of the Volcker Rule for foreign broker-dealers under Rule 15a-6.

ABOUT MORRISON & FOERSTER

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer*'s A-List for 12 straight years, and the *Financial Times* named the firm number six on its 2013 list of the 40 most innovative firms in the United States. *Chambers USA* honored the firm as its sole 2014 Corporate/M&A Client Service Award winner, and recognized us as both the 2013 Intellectual Property and Bankruptcy 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.

CONTACTS

United States Federal Income Tax Law

Thomas A. Humphreys
(212) 468-8006
thumphreys@mofo.com

Stephen L. Feldman
(212) 336-8470
sfeldman@mofo.com

David J. Goett
(212) 336-4337
dgoett@mofo.com

Remmelt A. Reigersman
(212) 336-4259
rreigersman@mofo.com

Shiukay Hung
(212) 336-4331
shung@mofo.com

Alexander I. Birkenfeld
(212) 336-4012
abirkenfeld@mofo.com

Nicole M. Humphrey
(212) 336-4234
nhumphrey@mofo.com

Brennan W. Young
(212) 336-4233
byoung@mofo.com

Corporate + Securities Law

Anna T. Pinedo
(212) 468-8179
apinedo@mofo.com

Lloyd S. Harmetz
(212) 468-8061
lharmetz@mofo.com