

TAX TALK

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EDITOR'S NOTE

Halloween is just around the corner, and if the government doesn't issue the section 385 regulations soon, the references to those controversial regs and “trick or treat” in law firm client alerts will be overwhelming (and not that funny). Tax Talk is making no predictions on the regulations, but we do give the reader an update on various related developments in Tax Talk 9.03. We also cover the latest development in commodity-oriented regulated investment companies (“RICs”). For over a decade, the small investor has sought a way to invest in commodities through open or closed end mutual funds. Unfortunately, commodities were not much of an investment class in 1942 when the predecessor of subchapter M was enacted by Congress, and RICs, therefore, were basically restricted to investments in securities. In the early 2000s, investment advisors bridged the gap using commodity swaps. They would get opinions from their erstwhile '40 Act legal advisers that such swaps “should” be securities under the '40 Act and, therefore, were securities under the RIC rules. The Internal Revenue Service (“IRS”) put a stop to that in Rev. Rul. 2006-1. However, the pressure from investors was great enough that the government agreed to a two part workaround: (i) the IRS would rule privately that certain structured notes were securities under subchapter M, and (ii) the IRS would provide private letter rulings that made investing in commodities through a foreign corporation relatively easy. Many rulings were issued until 2011 when the government stopped ruling, perhaps because Congress was casting its gaze on Cayman Islands corporations used by U.S. taxpayers for all sorts of purposes and saw lots of commodity investing Cayman subsidiaries formed by U.S. RICs. Anyway, Tax Talk 9.03 describes the latest round in this saga which involves the government trimming back its 10 year old private letter ruling policy.

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Tax Talk 9.03 also covers temporary regulations on electing into the new partnership audit rules, updated highlights of the presidential candidates' tax plans, the final regulations defining marital status, and more.

IRS ISSUES PROPOSED REGS ON RIC COMMODITY INVESTMENTS

On September 27, 2016, the IRS issued proposed regulations (the "Proposed Regulations") providing guidance relating to the income test and asset diversification requirements for determining whether a corporation qualifies as a RIC for federal income tax purposes. Generally, the Proposed Regulations state that (a) the IRS will no longer rule on what assets are securities for the purposes of section 851 and this determination will be made under the Investment Company Act of 1940, as amended (the "1940 Act"),¹ and (b) inclusions from controlled foreign corporations ("CFCs") and passive foreign investment companies ("PFICs") will not be treated as dividends for purposes of the income test without a corresponding distribution from a foreign subsidiary's earnings and profits.

This guidance is the first word on these issues since the IRS suspended its issuance of private letter rulings ("PLRs") relating to commodity linked notes and indirect investments in commodities through wholly-owned subsidiaries in July 2011.

"Security" for RIC Rules

Generally, in order for a corporation to qualify as a RIC for a taxable year, it must meet the income test of section 851(b)(2) and the asset diversification requirements of section 851(b)(3). In the past, the IRS has addressed whether certain instruments or positions are "securities" for purposes of section 851. Principally, the Preamble to the Proposed Regulations discusses Revenue Ruling 2006-1, in which the IRS concluded that a derivative contract with respect to a commodity index is not a security for purposes of section 851(b)(2). Revenue Ruling 2006-1 was then modified by Revenue Ruling 2006-31, which stated that Revenue Ruling 2006-1 was not meant to preclude certain instruments (e.g. structured notes) creating commodity exposure from being "securities" for the purposes of the RIC rules. After Revenue Ruling 2006-31 was issued, the IRS received and granted numerous ruling requests concerning whether certain structured notes were "securities" for purposes of the RIC rules.²

Under the Proposed Regulations, the IRS will no longer rule on what constitutes a "security" for the purposes of the RIC rules. Instead, the determination of what is a "security" for the purposes of the RIC rules will be made under section 2(a)(36) of the 1940 Act. At the same time the IRS released the Proposed Regulations, it also released Rev. Proc. 2016-50, which provides that the IRS will not ordinarily issue rulings or determination letters on issues relating to the treatment of a corporation as a RIC that require a determination of whether a financial instrument is a "security" under the 1940 Act.

The IRS has requested comments as to whether Revenue Ruling 2006-1, Revenue Ruling 2006-31, and other previously issued guidance that involves determining what assets are "securities" under the 1940 Act should be withdrawn effective as of the date the Proposed Regulations are finalized.

Inclusions from CFCs and PFICs

Apart from using structured notes to gain exposure to commodities, RICs also use investments in wholly-owned foreign subsidiaries to gain such exposure. Those foreign subsidiaries invest in commodity futures and other commodity derivatives. When such subsidiaries are wholly-owned by U.S. corporations, those entities become CFCs and are therefore subject to subpart F of the Code. Generally, a CFC is a foreign corporation where U.S. persons separately owning at least 10% of the voting power together own 50% of the voting power of such corporation, and a PFIC is a foreign corporation with 75% of its gross income being passive income or 50% or more of its assets being held for the production of passive income.³ U.S. shareholders of a CFC are taxed on a current basis on passive income received by the CFC from dividends, interest, rents, and royalties, regardless of whether or not such income is distributed to such shareholders.

Beginning in 2006, the IRS issued a significant number of PLRs holding that inclusions of subpart F income by a RIC would qualify for the purposes of the RIC income test,⁴ regardless of whether the wholly-owned subsidiary giving rise to the subpart F income made a distribution out of its earnings and profits to its RIC parent. The rulings concluded that CFF inclusions were "other income derived with respect to" a RIC's business of investing in securities under section 851(b)(2).

The Proposed Regulations state that inclusions from a CFC or PFIC held by a RIC will be treated as qualifying for the RIC asset test only to the extent that there is a corresponding distribution of cash or other property out of its earnings and profits.

¹ All section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, unless otherwise indicated.

² See, e.g., PLR 200628001, PLR 200637018, and PLR 200647017, among a number of others.

³ If the CFC rules apply to a foreign subsidiary, the PFIC rules do not apply. Therefore, a foreign subsidiary wholly-owned by a U.S. RIC is a CFC and not a PFIC.

⁴ See PLR 200647017, PLR 200741004, PLR 200743005, and PLR 200822010, among others

The Proposed Regulations for inclusions from CFCs and PFICs apply to tax years that begin on or after the date that is 90 days after the date the final version of the Proposed Regulations is published in the Federal Register.

HIGHLIGHTS OF PRESIDENTIAL CANDIDATES TAX PLANS

Since our spring issue, the presidential race has narrowed down to two, Hillary Clinton and Donald Trump.⁵ Below are the highlights of their respective tax proposals:

Candidate	Individual Income Tax	Capital Gains Tax	Estate Tax	Corporate Tax	International Income
Hillary Clinton (D) ⁶	Minimum effective tax rate of 30% for income above \$1 million; 4% surcharge for income above \$5 million	For individuals in the top tax bracket, capital gains tax rate of 39.6% for investments held for two years or less, with rates gradually decreasing to 20% for investments held for more than six years	Increases the estate tax rate up to 65% and reduces the exemption to \$3.5 million per individual; eliminates the step-up in basis in property acquired from a decedent	Not specified	Reduces inversion test from 80% to 50%; limits interest deductions if a corporation's share of net interest expenses for U.S. tax purposes exceeds its share on consolidated financial statements; enacts an "exit tax" on multinationals that depart U.S.
Donald Trump (R) ⁷	Three tax brackets for individual income tax, with top marginal rate of 33% on income above \$112,500 for single filers (\$225,000 for married filers)	Taxes long-term capital gains and qualified dividends at a top marginal rate of 20%	Eliminates estate tax	Flat tax rate of 15% for corporations and pass-through businesses; eliminates corporate alternative minimum tax	Ends the deferral of overseas corporate income; enacts a deemed repatriation of foreign income at a 10% rate

In addition to the points addressed in the chart, the candidates have made a few other proposals worth highlighting.

First, Clinton plans to impose a "risk fee" on the liabilities of large financial institutions with more than \$50 billion in assets. This fee would be graduated, higher for firms with larger amounts of debt and riskier, short-term forms of debt. Second, both Clinton and Trump would change the taxation of

carried interest to characterize as ordinary income certain earnings of hedge fund, private equity, and other money managers. Finally, Trump would allow firms engaged in manufacturing in the U.S. to elect to fully expense plant and equipment costs (as opposed to the current system of depreciating such property over its useful life). However, taxpayers electing in to this full expensing would forgo the ability to deduct interest expenses.

REPORT ON CURRENT EVENTS FOR 385

On April 4, 2016, the IRS unexpectedly released proposed regulations under Section 385 (the "Proposed Regulations") that would (1) authorize the IRS to bifurcate an instrument into part-equity and part-debt (the "Bifurcation Rules"), (2) impose documentation requirements for certain related-party indebtedness to be respected as indebtedness for federal income tax purposes (the "Documentation Rules"), and (3) automatically treat debt instruments as equity for federal income tax purposes if they are issued in situations that the Treasury Department views as having limited non-tax effect (the "Automatic Equity Rules").⁸

⁵ See Volume 9, No.1 (May 2016).

⁶ Investing In America by Restoring Basic Fairness to Our Tax Code, available at <https://www.hillaryclinton.com/briefing/factsheets/2016/01/12/investing-in-america-by-restoring-basic-fairness-to-our-tax-code/>; Richard Auxier, Len Burman, Jim Nunns, and Jeff Rohaly, An Analysis of Hillary Clinton's Tax Proposals (March 3, 2016), available at <http://www.taxpolicycenter.org/publications/analysis-hillary-clintons-tax-proposals/full>.

⁷ Tax Reform That Will Make America Great Again, available at <https://assets.donaldjtrump.com/trump-tax-reform.pdf>; <https://www.donaldjtrump.com/positions/tax-reform>; Fact Sheet: Donald J. Trump's Pro-Growth Economic Policy Will Create 35 Million Jobs, available at <https://www.donaldjtrump.com/press-releases/fact-sheet-donald-j.-trumps-pro-growth-economic-policy-will-create-25-milli>.

⁸ For more information about the Proposed Regulations, see our client alert available at <https://media2.mofa.com/documents/160412irsdebtequityregulations.pdf>.

Recently, Republican members of the House Ways and Means Committee sent Treasury Secretary Jacob Lew a second letter voicing concerns about the Proposed Regulations.⁹ According to the letter, the Proposed Regulations “would interfere inappropriately with businesses’ investment and financing decisions” and “would have the effect of blocking the ability of businesses to operate effectively and grow and hire new workers.”

On September 14, 2016, Secretary Lew met with members of the House Ways and Means Committee. According to reports of the meeting, Secretary Lew promised to address concerns about the Proposed Regulations but also promised to move forward with finalizing the regulations.¹⁰ House Ways and Means Committee Chairman Kevin Brady (R-TX) released a statement after the meeting asking that Treasury “slow the process down, make all the necessary changes, and conduct a true cost benefit analysis. Instead of finalizing the regulations now, the Administration should issue new proposed regulations that address stakeholders’ serious concerns.”

On September 27, 2016, Congressman Pat Tiberi (R-OH) released a statement that “far-reaching, one-off regulations are hurting our economy and making it harder for American businesses to invest at home.” Congressman Tiberi’s statement followed a letter by 47 companies with headquarters, significant investments, or business interests in Ohio, stating that the Proposed Regulations “go far beyond Treasury’s stated intent to curtail abusive transactions.”

All signs are that Treasury is moving forward to finalize the regulations, despite the criticisms from lawmakers and business interests. Although it remains to be seen the extent to which the final regulations will respond to comments from interested parties, it is a safe bet that, if ultimately issued, final Section 385 regulations will have a significant impact on U.S. tax considerations for businesses around the globe.

ABDULLAH SALEG ALSHEKH V. JACOB LEW

Recently, the U.S. District Court for the Northern District of California dismissed a taxpayer’s challenge to the constitutionality of the Foreign Account Tax Compliance Act (“FATCA”).

Congress passed FATCA in 2010 to improve compliance with tax laws by U.S. taxpayers holding foreign accounts. FATCA accomplishes this through two forms of reporting: 1) by foreign financial institutions (FFIs) about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest, and 2) by U.S. taxpayers about their interests in certain foreign financial accounts and offshore assets.

Plaintiff, Abdullah Saleh Alsheikh, was a U.S. citizen working abroad in Saudi Arabia. He filed a complaint alleging that FATCA threatened the privacy rights of U.S. citizens who owned foreign bank accounts by requiring banks to disclose private information of the account owner without any chance for the citizen to object and without any suspicion of wrongdoing by the citizen. The complaint contained five claims: 1) the first claim alleged that FATCA violated the tenth amendment; 2) the second claim challenged FATCA on the basis that the information it requires a foreign institution to provide constitutes an unlawful search under the fourth amendment; and 3) claims three through five alleged FATCA violated the plaintiff’s procedural due process, substantive due process, and equal protection rights. These allegations pose a myriad of thought-provoking questions; however, none were answered since the District Court dismissed both plaintiff’s complaint and amended complaint for lack of standing.

The elements of constitutional standing are: 1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical; 2) there must be a causal connection between the injury and the conduct complained of; and 3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

The Court stated the plaintiff alleged no facts supporting his contention that his information was reported, thus showing a lack of actual injury. Moreover, the complaint did not sufficiently allege the threatened harm was imminent. In fact, even though Saudi Arabia had reached an agreement with the U.S. on an Intergovernmental Agreement (“IGA”) to enforce FATCA, the IGA had yet to be implemented. Therefore, according to the court, the plaintiff’s allegations of harm were merely hypothetical future harms that did not provide standing.

⁹ New W&M GOP Letter to Treasury: Proposed Regs Will Hurt U.S. Economy, Stifle Job Creation at Home, Tax Analysts Doc 2016-16979 (August 22, 2016).

¹⁰ Concerns About Debt-Equity Regs Persist Following Lew Meeting, 2016 TNT 179-2 (September 15, 2016).

FINAL REGULATIONS CLARIFY THE DEFINITION OF “REAL PROPERTY” UNDER THE REIT RULES

On August 31, 2016,¹¹ the Treasury Department published final regulations (the “Final Regulations”)¹² clarifying the definition of “real property” under the real estate investment trust (“REIT”) rules. The Final Regulations predominantly adopt the proposed regulations (the “Proposed Regulations”)¹³ published on May 14, 2014, with only slight modifications despite numerous comments from various industry groups to broaden the definition of “real property” under the Final Regulations.

As did the Proposed Regulations, the Final Regulations flesh out the current definition of “real property” (contained in regulations promulgated in 1962 (the “Existing Regulations”)) to include expressly the types of property for which the IRS had previously provided favorable private letter rulings (“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. Adopting the approach in the Proposed Regulations, the Final Regulations continue to provide a framework for determining whether property that is not expressly addressed in the Final Regulations should be characterized as real property and include detailed examples illustrating the application of the framework.

Similar to the Proposed Regulations, the Final 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. Consistent with the Proposed Regulations, the preamble to the Final 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 gross income tests.¹⁴

As did the Proposed Regulations, the Final 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 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. For the renewable energy industry, the Final Regulations make some helpful clarifications but generally follow the Proposed Regulations’ approach in limiting the circumstances in which renewable energy property is treated as a qualifying REIT asset. The preamble to the Final Regulations further clarifies that, similar to photovoltaic modules, inverters that are used to generate electricity that is sold to third parties also would not qualify as real property.

The Final 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, taxpayers should take note that previously issued PLRs are revoked prospectively from August 31, 2016, to the extent they are inconsistent with the Final Regulations.

REV. PROC. 2016-45: IRS NOW WILLING TO RULE ON BUSINESS PURPOSE AND DEVICE

Section 355 provides for the tax-free distribution of a controlled corporation to the shareholders of the distributing corporation if certain conditions are satisfied. Two of these conditions are 1) the transaction cannot be used principally as a device for the distribution of the earnings and profits of the distributing corporation, the controlled corporation, or both; and 2) the transaction must be carried out for one or more corporate business purposes.

In Rev Proc 2016-3, the IRS designated as no-rule areas the issues of whether a distribution of stock of a controlled corporation satisfies the corporate business purpose requirement or whether it is used principally as a device. The IRS has reversed its position, and, according to Rev Proc 2016-45, the IRS has determined that it is appropriate to provide guidance to taxpayers relating to the corporate business purpose and the device requirements.

¹¹ For more information about the Proposed Regulations, see our client alert available at <https://media2.mofo.com/documents/160914-real-property-reit-rules.pdf>.

¹² 81 Fed. Reg. 59849 (2016). Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-31/pdf/2016-20987.pdf>.

¹³ 79 Fed. Reg. 27508 (2014).

¹⁴ Instead, the IRS and the Treasury Department have listed guidance clarifying the definition of REIT income on their 2016-2017 Priority Guidance Plan dated August 15, 2016.

NEW REGULATIONS ON ELECTION IN TO NEW PARTNERSHIP AUDIT RULES

Last November, the Bipartisan Budget Act of 2015 (the “Act”) became law, which repealed the TEFRA Unified Audit Procedures (the “TEFRA Rules”) and replaces them with a modified “corporate” model for partnership tax audits (the “2018 Rules”).¹⁵ The new rules become effective starting January 1, 2018, but taxpayers have the option to elect into that regime for any partnership returns filed for tax years beginning after November 2, 2015. On August 2, 2016, the IRS released temporary regulations (the “Regulations”) providing rules for the time, form, and manner for electing into the new partnership audit rules early.¹⁶ The following summarizes the highlights from the Regulations.

Under the Regulations, taxpayers can only elect into the 2018 Rules if they are notified by the IRS that a partnership for an eligible taxable year has been selected for examination. If a partnership receives such a notification, it can elect into the 2018 Rules by providing the IRS a written election statement within 30 days of receiving the IRS notification. The election statement must be signed under penalties of perjury and must include:

- a. The partnership’s name, taxpayer identification number, and the partnership year for which the election is being made;
- b. The name, taxpayer identification number, address, and phone number of the individual who signs the statement;
- c. Language stating that the partnership is making an election to apply section 1001(c) of the Act for the eligible tax year identified in the IRS notice; and
- d. The name, taxpayer identification number, address, and phone number of the “partnership representative,” as defined in the Act.

In addition to the administrative information listed above, the election statement must represent that the partnership (a) is not insolvent and does not reasonably expect to become insolvent before any IRS adjustment is resolved; (b) has not filed, and does not reasonably expect filing, a voluntary bankruptcy petition under title 11 of the United States Code; (c) is not subject to, and does not reasonably anticipate becoming subject to, an involuntary petition for bankruptcy relief under title 11; and (d) has and reasonably expects to have sufficient assets to pay

any potential imputed underpayment with respect to the partnership taxable year that may be determined.

If a partnership wants to file a request for an administrative adjustment under the Act but has not received an IRS notice, the Regulations allow the partnership to file an election statement under the 2018 Rules with its request for administrative adjustment. Such an election can only be filed with a request for administrative adjustment after January 1, 2018.

As described in our prior client alert, certain small partnerships can elect out of the 2018 Rules if such partnerships meet certain requirements. The Regulations state that if a partnership files an election under the Regulations to adopt the 2018 Rules, that partnership cannot elect out under that small partnership exception, even if it otherwise qualifies.

Finally, if a partnership has filed an administrative adjustment required under the existing TEFRA Rules for any partnership taxable year that would otherwise be eligible for election into the 2018 Rules, or a partnership is not subject to the TEFRA Rules but has already filed an amended return for a partnership taxable year that would otherwise be eligible, the partnership cannot elect to apply the 2018 Rules early under the Regulations.

The Regulations are effective beginning August 5, 2016.

FINAL REGS ON MARITAL STATUS

On September 2, 2016, the IRS issued final regulations that reflect the holdings of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Windsor v. United States*, 133 S. Ct. 2675 (2013); and Revenue Ruling 2013-17 (2013-38 IRB 201) and that define the terms in the Code describing the marital status of taxpayers for federal tax purposes. In response to these Supreme Court decisions that the federal government must recognize and states must allow same-sex marriages, the IRS published proposed regulations on October 23, 2015. The final regulations largely adopt the proposed regulations with some clarification.

Consistent with the proposed regulations, the final regulations provide that the terms “spouse,” “husband,” and “wife” mean an individual lawfully married to another individual, and the term “husband and wife” means two individuals lawfully married to each other without regard to the gender of the individuals being labeled by the terms.

The final regulations clarify that a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is

¹⁵ For a more detailed discussion of the Act, see our Client Alert, available at <https://media2.mofo.com/documents/1511106congresspartnershiptaxrules.pdf>.

¹⁶ T.D. 9780. Treas. Reg. Section 301.9100-22T. The temporary regulations were also issued as proposed regulations. Proposed Treas. Reg. Section 301.9100-22.

entered into, regardless of the married couple's place of domicile. The proposed regulations had provided that the marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by *any* state, possession, or territory of the United States. In response to comments that the proposed regulations could be interpreted to treat couples who divorce, who never intended to enter into a marriage under the laws of their domicile state, or who entered into an alternative legal relationship as married, the final regulations provide a general rule that a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage was solemnized. The IRS further clarified that, for couples married in foreign jurisdictions, a marriage is recognized for federal tax purposes if that marriage would be recognized in at least one state, possession, or territory of the United States.

In addition, the final regulations state that, while the term "marriage" includes both civil marriage and common-law marriage, it does not include registered domestic partnerships, civil unions, or similar relationships recognized under state law that are not denominated as a marriage under that state's law. The rationale for such exclusion is three-fold according to the IRS: (i) the IRS's reliance on a state's denomination of a relationship as marriage to determine marital status for federal tax purposes avoids inconsistencies with a state's intent regarding the status of a couple's relationship under state law; (ii) including such alternative legal arrangements in the definition of marriage may interfere with the choice of those couples who entered into an alternative legal arrangement with the expectation that their relationship would not be treated as a marriage for federal tax purposes; and (iii) many states have permitted couples in alternative legal relationships to convert their relationship to marriage, while continuing to designate marriage separately from these alternative legal relationships.

MOFO IN THE NEWS; AWARDS – Q3 2016

Morrison & Foerster was named "Global Law Firm of the Year" by *GlobalCapital* magazine for its 2016 Global Derivatives Awards. Morrison & Foerster was also named 2016 Americas Law Firm of the Year for the second year in a row by *GlobalCapital* for its Americas Derivatives Awards. We were named Americas Law Firm of the Year for the seventh time in eleven years by *Structured Products Magazine*. Morrison & Foerster was also named the 2016 Equity Derivatives Law Firm of the Year at the *EQDerivatives* Global Equity & Volatility Derivatives Awards. *myCorporateResource.com* awarded MoFo with the 2015 Client Content Law Firm of the Year Award

in recognition of law firms that produce worldbeating, client-facing content. Morrison & Foerster was nominated for the 2016 *Chambers USA* Awards for Excellence in three categories, including Tax. These awards are based on *Chambers & Partners'* research for the 2016 edition of *Chambers USA: America's Leading Lawyers for Business* and reflect a law firm's pre-eminence in key practice areas.

- On September 29, 2016, Partner Oliver Ireland, Partner Obrea Poindexter, and Of Counsel Sean Ruff hosted a teleconference entitled "Financing Fintech: Madden and TrueLender/Cash Call."
- On September 22, 2016, Partner Oliver Ireland led a PLI webinar entitled "Banking Agencies Propose Net Stable Funding Ratio: Mechanistic Approach to Liquidity Continues." The session focused on the federal banking agencies' proposed rule, to be effective January 1, 2018, that would require large banks to maintain a minimum Net Stable Funding Ratio (NSFR) over a 30-day horizon. Topics of discussion included: an overview of recent liquidity measures and interplay between short-term LCR Rule and long term NSFR; application and scope of the NSFR; calculation of the NSFR; NSFR shortfall and disclosure requirements; and potential impact of NSFR if finalized.
- On September 21, 2016, Partner Anna Pinedo and Partner James Tanenbaum were joined by David Donohoe, Jr., President, Donohoe Advisory Associates LLC, in hosting a teleconference entitled "Securities Exchanges, Shareholder Vote Requirements and the 20% Rule." The session focused on how transactions are affected by the requirements of the securities exchanges to seek shareholder approval in certain circumstances. Topics of discussion included: change of control issues; stock sales to related parties; private placements and PIPEs; warrants; acquisitions; and related issues.
- On September 15, 2016, Partner Peter Green and Partner Jeremy Jennings hosted a teleconference entitled "Getting Ready for PRIIPs." The session focused on the PRIIPs disclosure regime in Europe, which will affect most sectors of the retail investment products industry – securities, funds, deposits and insurance, as well as derivatives. Topics included: the scope of the PRIIPs Regulation; product descriptions; updates of KIDs; MRM and the categorization of PRIIPs; performance scenarios; and compliance deadline & grandfathering.
- On September 14, 2016, Of Counsel Bradley Berman hosted a teleconference entitled "Rule 506 'Bad Actor' Disqualification Provisions." The session focused on "bad actor" disqualification requirements, which prohibit issuers and others, such as underwriters, placement agents, directors, officers, and shareholders of the issuer, from participating in exempt securities

offerings if they have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws. Ahead of the third anniversary of the effectiveness of the new rules, this teleconference addressed: Who's covered? What are the disqualifying events? How does an issuer determine whether a covered person is disqualified? Does the SEC grant waivers from the disqualification provisions? How do you satisfy the SEC's standards for granting a waiver?

- On September 13, 2016, Partner Oliver Ireland hosted a West LegalEdcenter webinar entitled "New Executive Compensation Proposal." The session focused on the federal banking agencies' proposed rules on incentive compensation under Section 956 of the Dodd-Frank Act. Topics of discussion included: different requirements for different institutions; individuals covered; excessive compensation; deferrals requirements; claw backs; and significant comments.
- On September 12, 2016, Partner Anna Pinedo joined a panel of senior ECM professionals at IFR's "2016 US ECM Roundtable" in New York City. The Roundtable focused on examining the challenges and opportunities facing the market and providing an outlook for the year ahead and beyond. Topics of discussion included: the overall state of the market; the JOBS Act; energy; and risk/block trades and accelerated book builds.
- On September 9, 2016, Partner James Tanenbaum spoke on a panel entitled "Legal Issues for Equity Crowdfunding Platforms" at PLI's "Marketplace Lending and Crowdfunding 2016" seminar in New York City. Topics included: Crowdfunding under Title II – solicitation vs. non-solicitation; "reasonable steps to verify"; the preexisting relationship and CitizenVC: Myth vs. Facts; working with broker-dealers and other intermediaries; and liquidity and secondary markets including the new FAST Act and Section 4(a)(7).
- On September 1, 2016, Partner Anna Pinedo and Of Counsel Bradley Berman hosted an IFLR webinar entitled "Foreign Banks Raising Capital in the U.S." Topics of discussion included: issuances exempt from registration under Rule 144A; issuances that rely on registration exceptions provided by Securities Act Section 3(a)(2) for securities offered or guaranteed by banks; setting up a Rule 144A or bank note program for straight debt; issuing contingent capital or other securities convertible into equity upon the occurrence of a non viability event; Yankee CD programs; and banking and securities regulatory requirements to consider before setting up an issuance program.
- On August 18, 2016, Partner Peter Green hosted a session entitled "Update on Regulatory and Legal Issues Affecting European Structured Products Issuances" at Morrison & Foerster in New York City. Topics included: impact of Brexit on structured products issuances in the UK/EU; update on the PRIIPs Regulation and the new KID requirement due to come into effect from the beginning of 2017; the new EU Benchmark Regulation due to come into effect from the beginning of 2018; update on MiFID II, which is now due to come into effect from the beginning of 2018; and impact of Capital Markets Union and proposed new Prospectus Regulation.
- On August 1-2, 2016, Partner Anna Pinedo served as chairperson for PLI's "Private Placements and Hybrid Securities Offerings 2016" seminar in New York City. Ms. Pinedo spoke on the "Welcome and Introduction to Private Placements and Hybrid Financings" panel on day one of the conference and on the "Welcome and Introduction to Conducting Hybrid Offerings" panel on day two. Partner James Tanenbaum spoke on a panel entitled "Regulation A+" on day one of the conference.
- On July 28, 2016, Partner Lloyd Harmetz was joined by Mark Schaedel, Managing Director, IHS Markit in hosting a seminar entitled "Index Regulation and Outsourcing Index Administration" at Morrison & Foerster in New York City. Topics of discussion included: IOSCO and ESMA guidance on indices and proposed EU legislation; guidance and scrutiny of index governance policies and procedures; index methodologies and best practices; outsourcing index maintenance and sponsorship; and legal, regulatory, and business considerations.
- On July 27, 2016, Partner Ze'ev Eiger was joined by Tim McCormick, Partner, Stikeman Elliott LLP, in hosting a teleconference entitled "All Things Canadian." The speakers discussed the rules of the road for securities offerings by non-Canadian issuers selling into Canada and the prospectus regime applicable to Canadian issuers, with a focus on the shelf registration process and on dual-listed issuers. Topics included: shareholder requirements for private placements, PIPEs, and registered directs; completing a confidentially marketed offering; considerations for at-the-market offerings; timing of filing, approval, and withdrawal requirements; and which JOBS Act accommodations are available to Canadian issuers.
- On July 27, 2016, Of Counsel James Schwartz hosted a West LegalEdcenter webinar entitled "Security-based Swap Dealer Registration." Topics included: the SEC's registration rule for security-based swap dealers; its other security-based swaps rulemakings; and the likely timing for registration.
- On July 21, 2016, Partner Anna Pinedo spoke on the "Securities Act Exemptions/Private Placements" panel on day one of PLI's "Understanding the Securities Laws 2016" seminar in New York City. Topics included: exempt securities versus exempt transactions; Private placements; Regulation D offerings; Regulation A+

offerings; intrastate offerings; crowdfunding; employee equity awards; Rule 144A high yield and other offerings; Regulation S offerings to “non-U.S. persons”; and resales of restricted and controlled securities: Rule 144, Section 4(a)(7) and 4(a)(1½).

- On July 18, 2016, Partner Peter Green and Partner Jeremy Jennings-Mares hosted a West LegalEdcenter webinar session entitled “The European Securities Regime pre and post Brexit.” Topics of discussion included: the continued applicability of the Prospectus Directive and other EU securities regulation; access to the EU “passport” for multi jurisdictional EU offerings; the “home member state” of a non-EU securities issuer; disclosure “best practice”; and the EU Capital Markets Union, including the proposed new Prospectus Regulation (“PDIII”).
- On July 14, 2016, Partner Lloyd Harmetz hosted a teleconference entitled “CD Programs and Structured CDs.” Topics included: the banking and securities law rules that govern these products; frequently recurring issues that arise in structuring and documenting them; practical advice for creating and managing CD programs; and current trends in offerings from CD programs.
- On July 12, 2016, Partner Anna Pinedo and Partner James Tanenbaum were joined by Geoffrey Goodman, Managing Director, Equity Capital Markets, Wells Fargo, and Gregory Ogborn, Director, Equity Capital Markets, Wells Fargo in hosting an IFLR webinar entitled “Jack be Nimble, Jack be Quick: Planning for Financings in Volatile Markets.” The speakers covered: current market conditions; financing alternatives for pre-IPO companies; the market for venture debt; the late-stage (or “cross-over”) private placement market; options to consider on the way to an IPO; the ReIPO™; financing alternatives for recently public companies; and PIPE transactions and other financing alternatives.
- On July 7, 2016, Partner Peter Green and Partner Jeremy Jennings-Mares hosted a PLI webinar entitled “Brexit: Implications for Securities and other Financial Transactions.” The session focused on the impact of Brexit on: the continued applicability of the Prospectus Directive and other EU securities regulation; access to the EU “passport” for multi jurisdictional EU offerings; the “home member state” of a non-EU securities issuer; disclosure “best practice”; and the EU Capital Markets Union, including the proposed new Prospectus Regulation (“PDIII”).

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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.

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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 13 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.