Debt Repurchases & Exchanges

1.5 CLE Credits

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1. Presentation: Liability Management
2. Article: “Remarketings”
3. Newsletter: Tax Talk
Benefits associated with repurchases or exchanges of debt securities

- Perception. A buy back may signal that a company has a positive outlook.
- Deleveraging.
- Recording of accounting gain.
- Potential EPS improvement.
- Reducing interest expense.
- Potential regulatory and ratings benefits.
- Alternative to more fundamental restructuring or potential bankruptcy.
Why now?
Why now?

• New business and market realities.
• Deleveraging efficiently.
• Tax considerations.
• Investor perceptions.
  • Investors may be more willing to consider exchange and restructuring opportunities. Investors may seek liquidity or appreciate the opportunity to move up in the capital structure.
How?
Options explained

• Repurchases for cash:

  • Redemptions – purchase of outstanding debt securities for cash in accordance with their terms;

  • Repurchases – open market or privately negotiated purchases of outstanding debt for cash; and

  • Tender offers – an offer made to all holders of a series to repurchase outstanding debt securities for cash.
Options explained (cont’d)

- Non-cash tenders:
  - Exchange offers, including
    - Private exchange offers (4(2))
    - Section 3(a)(9) exempt exchange offers
    - Registered exchange offers
  - One-off exchanges
    - Debt equity swaps
    - Equity for equity exchanges
  - Consent solicitations
Choosing among these options

• Will depend upon the issuer’s objectives

• Will depend upon the issuer’s financial condition:
  • Distressed exchange
  • “Preventive” liability management
  • Opportunistic transactions

• Legal, accounting, ratings, regulatory capital and tax considerations should all be factored into the choice.
Factors to consider in choosing

• Cash?
  • If the company has cash on hand, open market repurchases or a tender will be possible.

• No cash?
  • If the company does not have cash on hand, or a repurchase would not be considered a prudent use of resources, a company should consider an exchange.

• Holders?
  • The company will have to consider whether the securities are widely held and the status (retail versus institutional) of the holders.

• Buying back a whole class of debt securities?
  • Open market repurchases will provide only selective or limited relief. A tender may be necessary to buy all of a class of outstanding bonds.
Factors to consider in choosing (cont’d)

- **Straight debt? Convertible debt? Hybrid?**
  - The company’s options will depend on the structure of the outstanding security. A repurchase/tender for straight debt typically will be more streamlined.

- **Tender?**
  - Again, the structure and rating of the outstanding security will drive whether the company can conduct a fixed spread or fixed price offer.

- **Covenants?**
  - Is the company concerned about ongoing covenants as well as de-leveraging?
Factors to consider in choosing (cont’d)

• Part of a broader effort?
  • The company should consider whether a buyback is only a precursor to a restructuring or recapitalization or whether an exchange offer/tender is only one element of a bigger process. The company should keep the bigger picture in mind.

• Mix and match?
  • Well, not really. It may be possible to structure a variety of transactions. However, a company should be careful to structure any liability management transactions carefully. Open market repurchases in contemplation of a tender may be problematic.
Thinking ahead

- Credit/loan facility terms that contain limitations on prepayments.
  - May be prohibited.
  - May trigger repayment obligations.

- Other debt security terms.

- Requirement to use proceeds for a particular purpose.
Redemptions
Redemptions

- Redeem outstanding debt securities in accordance with their terms, assuming governing documents do not prohibit redemption.
  - Certain debt securities may have call protection (not redeemable), or limited call protection (not redeemable for a certain period of time after issuance).
- Other debt instruments may prohibit redemption.
Redemptions (cont’d)

• Indenture usually specifies the procedures.
  
  • Usually requires notice of not less than 30 nor more than 60 days. Notice should include redemption date, redemption price and specify which, if not all, securities will be redeemed.
  
  • If not all securities are being redeemed, redemption is usually by lot or pro rata.
Redemptions (cont’d)

• Indenture usually specifies the redemption price.
  
  • Typically the redemption price will reflect the holders’ yield to maturity on the outstanding debt.

  • Redemption price usually equals the face amount, plus the present value of future interest payments (effectively causing the debt securities to be redeemed at a premium).
Other considerations

• Issuer must comply with anti-fraud protections under the securities laws.

• Issuers often announce via press release (in connection with providing the notice of redemption) their decision to redeem outstanding debt securities.
  • An issuer should disclose a redemption prior to contacting debtholders if its broader impact on the company’s financial condition would be viewed as material.
Debt Repurchases
Repurchases

• A repurchase can be effected a number of ways. The issuer may:
  • Negotiate the purchase price directly;
  • Engage a financial intermediary to negotiate and effect open market repurchases;
  • Agree with a financial intermediary to repurchase debt securities that the financial intermediary purchases on a principal basis.
Benefits of a repurchase

• Ability to negotiate purchase price allows issuer to take advantage of fluctuating market prices;
• Efficient means of refinancing because it requires little preparation, limited or no documentation and modest transaction costs; and
• Effective if the issuer is seeking to repurchase only small percentage of debt, or if the debt is not widely held.
Avoiding the tender offer rules

• An issuer repurchasing its debt securities, whether in privately negotiated transactions or in open market purchases runs the risk that it may inadvertently trigger the tender offer rules.
• The tender offer rules were adopted to ensure that issuers and other conducting tenders for equity securities would be prohibited from engaging in manipulative practices.
Avoiding the tender offer rules (cont’d)

• Tender offer is not defined by statute. Courts apply an eight factor test to determine whether a repurchase is a tender offer:
  • Active and widespread solicitation of public shareholders for the shares;
  • Solicitation is made for a substantial percentage of an issuer’s stock;
  • Offer to purchase is made at a premium over the prevailing market price;
  • Terms of the offer are firm rather than negotiable;
  • Offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
  • Offer is open only for a limited time;
  • Offeree is subjected to pressure to sell his stock; and
  • Public announcement of a purchasing program concerning the target company precedes or accompanies rapid accumulation of large amounts of the stock.
Avoiding the tender offer rules (cont’d)

• Any discussion of debt tenders should start with these factors. Thus, repurchase programs should be structured:
  • For a limited amount of securities;
  • To a limited number of holders (preferably sophisticated investors);
  • Over an extended period of time (with no pressure for holders to sell);
  • At prices privately and individually negotiated; and
  • With offers and acceptances independent of one another.
“Equity” for tender offer purposes

• Under the tender offer rules, debt with equity features is treated as equity.

• Tenders for convertible and exchangeable notes must comply with the provisions of Rule 13e-4.
Other considerations

• Private transactions with creditors/debtholders can trigger disclosure obligations under Reg FD.
  • When an issuer discloses any material nonpublic information to market professionals or holders of its securities who may trade on the basis of such information, the issuer must make public disclosure of that information.

• An issuer “testing the waters” may trigger this obligation.
  • May be avoided if the recipients of the information are subject to confidentiality agreements.
  • At what point should an issuer disclose its restructuring activities?
    • If an issuer is engaged in an ongoing repurchase program over an extended time, disclosure of each repurchase may not be appropriate until the process ends.

• Issuer should disclose other material nonpublic information (unreleased earnings, potential changes to credit ratings) prior to engaging in repurchases.
Other considerations (cont’d)

• Repurchases may trigger Regulation M concerns.
  • Rule 102 makes it unlawful for an issuer to “bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period.”
  • Repurchases of convertible debt may be deemed a “forced conversion” and thus a distribution of the underlying equity security under Regulation M.
Debt Tenders
Tenders for straight debt securities

- Tenders for straight debt securities are subject to Regulation 14E, Rules 14e-1, 14e-2 and 14e-3, but not the additional requirements applicable to equity securities.
Tenders for straight debt securities (cont’d)

• A tender offer:
  • May be subject to various conditions to closing, such as receipt of financing or waivers.
  • Must generally be held open for 20 business days (extended for 10 days if the amount of securities (provided the amount of securities increase or decreases by more than 2%), consideration or dealer manager’s fee increases or decreases).
  • Any extension must be announced via press release the day after scheduled expiration and must indicate the number of securities tendered.
Tenders for straight debt securities (cont’d)

• An issuer may approach all the holders of a series of outstanding debt securities.
• Regulation 14E does not require filing of tender offer documents.
Investment grade v. non-investment grade debt

- Tenders of investment grade debt are viewed differently by the SEC than those for non-investment grade debt:
  - Investment grade debt is not subject to the 10- and 20-business day requirements.
  - Issuers of investment grade debt are able to price a tender offer based on a fixed-spread or a real-time fixed-spread over a benchmark security.
  - “Hybrids” and trust preferred securities generally will be considered investment grade debt.
Participation

• Why would a holder participate?
  • An issuer can provide for an “early tender premium.”
  • Holders that tender early receive the “total consideration” while holders that don’t tender before the early tender period receive lesser consideration.

• Can a holder withdraw once it tenders?
  • Though not required, it is market standard to provide withdrawal rights for debt tenders.
How is a tender priced?

- SEC allows use of a “modified Dutch action” pricing mechanism.
  - Issuer sets a range of prices at which a holder may tender the securities. Purchase price is highest price at which the issuer is able to buy all of the securities for which it tendered. Range need not be disclosed if aggregate amount of securities to be purchased is disclosed.
Investment Grade Debt
Tenders for investment grade debt

- SEC views tenders for cash for any and all non-convertible, investment grade debt differently than other tenders.
- Tenders for non-convertible, investment grade debt are not subject to 10- and 20-business day requirements if:
  - Offers to purchase were made for any and all of the debt securities of a particular series;
  - Offer is open to all record and beneficial holders of the series;
  - Offer is conducted to afford all record and beneficial holders a reasonable opportunity to participate (including expedited dissemination if offer is open for fewer than 10 days); and
  - The tender is not being made in anticipation of, or in response to, other tender offers for the issuer’s securities.
Pricing – fixed spread

• Tenders for investment grade debt may be priced using a fixed-spread tender.
  • Priced on each day during the offer period by reference to a fixed spread over the then-current yield on a specified benchmark U.S. Treasury security determined as of the date, or a date preceding the date, of tender;
  • The offer must provide that information about the benchmark security will be reported in a daily newspaper of national circulation; and
  • The offer must provide that tendering holders will be paid promptly.
Pricing – real-time fixed-spread

• Tenders for investment grade debt also can be priced using a real-time fixed-spread.
  • Priced by reference to a stated fixed spread over the most current yield on a benchmark U.S. Treasury security determined at the time the holder tenders, rather than by reference to a benchmark security as of the date, or at the date preceding the date, of tender.
  • The offer must:
    • clearly indicate the benchmark interest rate to be used and must specify the fixed spread;
    • state the nominal purchase price that would have been payable based on the applicable yield immediately preceding the commencement of the tender;
    • indicate the reference source to be used to establish the current benchmark yield;
    • describe the methodology used to calculate the purchase price; and
    • indicate that the current benchmark yield and the resulting nominal purchase price will be available by calling a toll-free number established by the dealer.
Other considerations

• Many issuers of investment grade debt issued the securities pursuant to Euro MTN programs or and offshore pursuant to Reg S.

• An issuer must not only comply with US regulations, but also with the laws of the home-country of the holder.
  • Market Abuse Directive prohibits insider trading and requires disclosure.
  • Anti takeover restrictions provide guidance for issuers tendering:
    • All holders must be treated equally; and
    • All holders must have sufficient time and information to enable them to reach an informed decision.
Why are repurchases and exchanges important for financial institutions?

- Financial institutions generally have been investment grade issuers and can conduct a tender or exchange under the relaxed rules for investment grade debt.
- A financial institution will benefit (from a capital perspective) by buying back debt securities (not just guaranteed) that are trading at a discount and cancelling such securities.
  - Government securities (like outstanding TLGP securities) are exempt from the requirements of Regulation 14E, simplifying the tender process for a financial institution.
- Facing the Dodd-Frank trust preferred phase out and upcoming Basel III compliance dates.
A Comparison: Investment Grade v. Non-Investment Grade Debt

• Investment Grade Debt:
  • Generally must remain open for 7-10 calendar days;
  • Offer must be extended 5 calendar days for certain modifications to terms;
  • Must be conducted to afford all holders the reasonable opportunity to participate, including dissemination of the offer material on an expedited basis (within two days after commencement);
  • Able to price using a fixed-price spread or a real-time fixed price spread.

• Non-Investment Grade Debt:
  • Must remain open for 20 business days;
  • Offer must be extended 10 business days for certain modifications to terms;
  • Able to use a fixed-price spread that is set two days prior to expiration of the exchange offer.
Convertible or Exchangeable Debt
Tenders for convertible debt

• Under the tender offer rules, convertible or exchangeable debt securities are treated like equity securities subject to the rules applicable to equity tender offers.
  • Issuer must file with the SEC a Schedule TO (subject to SEC review).
  • Offer must be made to all holders.
  • “Best price” rule – consideration paid to any holder for securities tendered must be the highest consideration paid to any other holder for securities tendered.
  • Tender must be announced, usually via Wall Street Journal publication.
  • Tender must include withdrawal rights for offer period – securities may be withdrawn after 40 business days from commencement.
  • Issuer may not make any purchases (until 10 days after termination of the tender offer) other than through the tender.
Tenders for convertible debt (cont’d)

• Things to consider.
  • Not possible to “sweeten” the tender offer with an early tender premium.
    • Less flexibility than a tender for straight debt.
  • May have accounting implications.
  • Consider effect on call spread agreements.
  • Tender of convertible debt may be deemed a “forced conversion” and result in a
distribution of the underlying equity for Regulation M purposes.
Exchange Offers
Exchange offers

- If an issuer does not have, or is unable to use, available cash, it may be prudent to effect an exchange offer.
  - Means of reducing interest payments, reducing principal amount of outstanding debt securities and managing maturities.
  - Must comply with both the Exchange Act (tender offer rules) and Securities Act (registration) requirements.
  - Any exchange offer must either be registered with the SEC or be exempt from registration:
    - Exempt exchange offers rely on Section 4(2) or Section 3(a)(9).
Private exchange offers

Private exchange offers conducted pursuant to Section 4(2) are subject to limitations:

- May not constitute a “general solicitation” and must be made only to “sophisticated investors,” usually qualified institutional buyers (QIBs).
- Issuers often pre-certify holders to ensure they meet the sophistication standard.
- Securities issued will not be freely tradable securities:
  - Holders may request registration rights.
  - Holders may sell under Rule 144 (may be able to tack).
Private exchange offers - process

• A private exchange offer may be conducted on an abbreviated timeline.
  • Identify and pre-certify (QIB, accredited investor status) investors;
  • Announce exchange offer;
  • Distribute exchange information (not required to be filed with SEC, not subject to SEC review);
  • Solicit exchanges and/or consents;
    • May engage a dealer-manager to assist.
  • Offer period expires; and
  • Close and announce results of exchange offer.
Lock-ups and registered exchange offers

• There has always been concern regarding approaching investors privately in connection with an exchange offer that will be a registered exchange

• Has the issuer commenced unregistered offers?
Lock-up agreements in registered exchange offers

- The SEC issued guidance on the use of lock-up agreements in registered exchange offers (the SEC’s Compliance and Disclosure Interpretations for the Securities Act Sections (”C&DI’s”)).

►C&DI 139.29:
- **Question:** May an issuer contemplating a registered debt exchange offer execute a lock-up agreement (or agreement to tender) with a note holder before the filing of the registration statement?
- **Answer:** The execution of a lock-up agreement (or agreement to tender) may constitute a contract of sale under the Securities Act. If so, the offer and sale of the issuer's securities would be made to note holders who entered into such an agreement before the exchange offer is made to other note holders. Recognizing the legitimate business reasons for seeking lock-up agreements in this type of transaction, the staff will not object to the registration of offers and sales when lock-up agreements have been signed in the following circumstances:
Lock-up agreements in registered exchange offers (cont’d)

- the lock-up agreements are signed only by accredited investors;
- the persons signing the lock-up agreements collectively own less than 100% of the outstanding principal amount of the particular series of notes;
- a tender offer will be made to all holders of the particular series of notes; and
- all note holders eligible to participate in the exchange offer are offered the same amount and form of consideration.

When lock-up agreements are executed before the filing of a registration statement and the circumstances noted above are not satisfied, the subsequent registration of the exchange offer on Form S-4 may be inappropriate. An exchange offer is a single transaction, and a transaction that has commenced privately must be completed privately. Similarly, if a note holder actually tenders its notes — for example, by signing a transmittal form — before the filing of the Form S-4, the staff has objected to the subsequent registration of the exchange offer on Form S-4 for any of the note holders because offers and sales have already been made and completed privately. An issuer seeking to lock up note holders must also consider whether such efforts represent the commencement of a tender offer. [Aug. 11, 2010]
Lock-up agreements in registered exchange offers (cont’d)

 ► C&DI 139.30:

 • Question: In a negotiated third-party exchange offer, may an acquiring company execute a lock-up agreement (or agreement to tender) before the filing of the registration statement to obtain a commitment from management and principal security holders of a target company to tender their shares in the exchange offer?

 • Answer: The execution of a lock-up agreement (or agreement to tender) may constitute a contract of sale under the Securities Act. If so, the offer and sale of the acquiror’s securities would be made to persons who entered into such an agreement before the exchange offer is made to other target security holders.

 Recognizing the legitimate business reasons for seeking lock-up agreements in the course of negotiated third-party exchange offers, the staff will not object to the registration of offers and sales where lock-up agreements have been signed in the following circumstances:
Lock-up agreements in registered exchange offers (cont’d)

- the lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the subject securities of the target company;
- the persons signing the lock-up agreements collectively own less than 100% of the subject securities of the target;
- a tender offer will be made to all holders of the subject securities of the target; and
- all holders of the subject securities of the target eligible to participate in the exchange offer are offered the same amount and form of consideration.

When lock-up agreements are executed before the filing of a registration statement and such agreements exceed the circumstances noted above, the subsequent registration of the exchange offer on Form S-4 may be inappropriate. An exchange offer is a single transaction, and a transaction that has commenced privately must be completed privately. Similarly, if a holder actually tenders its subject securities — for example, by signing a transmittal form — before the filing of the Form S-4, the staff has objected to the subsequent registration of the exchange offer on Form S-4 for any of the holders of the subject securities because offers and sales have already been made and completed privately. An acquiring company seeking to lock up holders of the subject securities must also consider whether such efforts represent the commencement of a tender offer. [Aug. 11, 2010]
Section 3(a)(9) exchange offers

• Section 3(a)(9) exempts from the registration requirements “any securities exchanged by the issuer with its existing securityholders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.”
Section 3(a)(9) exchange offers (cont’d)

- Section 3(a)(9) exchange has five requirements:
  - Securities must be of the same issuer
    - SEC will look at the underlying economic reality when examining this issue.
    - SEC provided no-action letter relief for the issuance of a new parent security in exchange for an outstanding parent security that has one or more “upstream” guarantees from the parent’s 100% owned subs
  - No additional consideration from holders
    - The securityholder cannot pay anything of value besides the outstanding security;
    - Rule 149 permits cash payments to effect an equitable adjustment in respect of interest or dividends paid.
  - Exchange must be offered exclusively to the issuer’s existing securityholders
    - An issuer may violate this requirement if conducting a simultaneous offering of new securities for cash.
Section 3(a)(9) exchange offers (cont’d)

- The issuer must not pay any commission or remunerations for the solicitation of the exchange; and
  - Must consider the relationship between the issuer and the person furnishing the services, the nature of the services performed and the method of compensation.
  - An issuer’s directors, officers and employees may solicit, provided that is not their only role and they receive no bonus for such activities.
  - Activities by third-parties must be “ministerial” or “mechanical.”

- The exchange must be made in good faith and not as a means of avoiding registration.
Section 3(a)(9) exchange offers (cont’d)

• Considerations for Section 3(a)(9) exchanges:
  • Securities issued as part of the exchange are subject to the same transfer restrictions as the original securities.
  • Exchange offer may be “integrated” with other securities offerings conducted in close proximity to the exchange.
    • Issuer should apply the SEC’s five factor integration test in conducting this analysis.
Role of financial adviser

• A financial adviser may not earn a “success” fee.
  • Should be paid a fixed advisory fee.

• A financial adviser can:
  • Engage in pre-launch negotiations with bondholder committees;
  • Provide a fairness opinion; and
  • Provide debtholders with information that was included in information sent by the issuer.

• A financial adviser cannot:
  • Solicit, directly or indirectly, consents or exchanges; and
  • Make recommendations.
Registered exchange offers

• Registered with the SEC on a Form S-4 registration statement.
  • Must include descriptions of the securities being offered, the terms of the exchange offer, description of the issuer, risk factors, and, if applicable, pro forma financial statements.
  • Commencement may not start until registration statement is declared effective.
    • Rule 162 provides flexibility allowing early commencement provided that no securities are actually exchanged/purchased until the registration statement is effective and the tender has expired.
    • Expanded in December 2008 to apply to exchange offers for straight debt provided the offer has withdrawal rights, if a material change occurs, the information is disseminated in accordance with the tender offer rules and the offer is held open for the minimum periods specified in Rule 13e-4 and Regulation 14D.
Considerations for exchange offers

• Because an exchange offer involves the offering of new securities, participants are subject to liability under Section 11 of the Securities Act.
  • If an issuer engages a financial intermediary to assist with solicitation, it may be subject to statutory underwriter liability and will conduct its own diligence review, and require delivery of comfort letters and legal opinions.

• As with a tender offer, an issuer needs to be mindful of Regulation M’s prohibitions on bidding for, or purchasing, its securities when it is engaged in an offer.
Incentives and Disincentives
Incentives and disincentives for tenders and exchanges

• Minimum threshold. To discourage holdouts require, as a condition to the tender or exchange, require that a substantial percentage (typically 90% or higher) of the outstanding securities be tendered.

• Sweeteners. Encourage acceptance of the tender or exchange offer by providing a cash payment or better terms for the new securities. Consider offering tendering/exchanging holders an inducement in the form of a warrant “kicker” or common stock (if there is potential for future upside), or exchanging high coupon, unsecured debt for low coupon, secured debt. In addition, consider providing recourse to collateral.
Incentives and disincentives for tenders and exchanges

- **Exit consents.** Solicit “exit consents” simultaneous with the tender or exchange offer to penalize holdouts (by stripping protective covenants and events of default from the old securities).

- **Early tender premium or consent payment.** Motivate holders to tender early by establishing an early tender premium or early consent payment. The “best price” rule does not apply to tender and exchange offers for straight debt securities.

- **The bankruptcy threat.** In a restructuring, convey that bankruptcy is unavoidable if the tender or exchange offer fails and that debtholders will be in a better position if bankruptcy is avoided. This involves a delicate balancing act.
Challenges to consider

- Holdouts
  - The company and its advisers should consider how to address potential holdouts—one approach may be to include a high minimum tender or exchange condition (such as 90% or higher).

- Timetable
  - Starting out with a timetable that complies with both contractual deadlines and tender offer rules is key to a successful process.

- Bondholder committees
  - A bondholder committee may be helpful in the context of a broad restructuring or recapitalization. However, the interests of bondholders may not be aligned. For example, the interests of hedge fund holders of convertible debt may not be compatible with the interests of institutional investors that hold straight debt or hybrid securities. Disagreements among committee members can delay or prevent a successful tender or exchange offer.
Exchange Offer with a Prepack
Exchange Offer with a Prepack

• An issuer may opt to structure a transaction as an exchange offer with a prepackaged bankruptcy
  • efficient to seek votes on an exchange and/or for issuer approval to file the prepack
  • prepack disclosure requirements to consider
  • “status” of securities
Section 1145 of the Bankruptcy Code

- In the bankruptcy context the “private placement” exemption in Section 4(a)(2) of the Securities Act may be unavailable.
  - i.e., the issuance of “reorganization securities” to a large class of claim holders may be insufficiently “private” to fit within the exemption.
- Section 1145(a)(1) of the Bankruptcy Code allows a debtor or certain related entities (a successor or affiliate participating in a joint plan with debtor) to offer and sell securities under a plan to creditors without registration under Section 5 of the Securities Act.
- To qualify for the registration exemption, the securities must be issued “in exchange for… or principally in exchange for” claims against the issuer.
- Section 1145(c) deems an offer or sale of securities in conformity with Section1145(a)(1) to be a “public offering” for Securities Act purposes.
  - Securities received by creditors under Section 1145(a)(1) are freely tradable and unrestricted.
Section 1145 of the Bankruptcy Code (cont’d)

• Section 1145(a)(2) provides that the offer of a security through any “warrant, option, right to subscribe or conversion privilege” that was made or sold in exchange for a claim against the debtor, or “the sale of a security upon the exercise of such a…” is also exempt under Section 1145.
  • The registration exemption is applicable through Section 1145(a)(2) to the offer of warrants and the sale of underlying common stock upon exercise of the warrants.
• There is an independent obligation of the Bankruptcy Court to determine:
  • (1) whether a disclosure statement contains adequate information, and
  • (2) whether the proposed plan of reorganization satisfies Section 1129 of the Bankruptcy Code, including Ssection 1129(d) which prohibits confirmation of a plan of reorganization if the Bankruptcy Court determines that the “primary purpose” of the plan of reorganization is to avoid the application of Section 5 of the Securities Act.
Section 1145 of the Bankruptcy Code (cont’d)

• Recipients of securities issued in exchange for creditors’ claims under an approved Chapter 11 plan of reorganization, can resell the securities without registration under the Securities Act, unless the recipient is an “underwriter” within the meaning of Section 1145(b)(1) of the Bankruptcy Code.
  • Resales pursuant to Section 4(1) of the Securities Act.
• Section 1145(b)(1) defines an entity as an “underwriter” if such entity:
  • (A) purchases a claim against, interest in, or claim for an administrative expense in the case concerning the debtor, if such purchase is with a view to distribution of any security received or to be received in exchange for such a claim or interest;
  • (B) offers to sell securities offered or sold under a plan for the holders of such securities;
  • (C) offers to buy securities offered or sold under a plan from the holders of such securities, if such offer to buy is (i) with a view to distribution of such securities, and (ii) under an agreement made in connection with a plan, with the consummation of a plan, or with the offer or sale of securities under a plan; and
  • (D) is an “issuer” with respect to the securities, as the term “issuer” is defined in Section 2(11) of the Securities Act.
Section 1145 of the Bankruptcy Code (cont’d)

• Even if a creditor falls within the narrower definition of “underwriter” – as long as it is not an affiliate of the issuer – Section 1145(b)(1) provides it will not be viewed as an underwriter with respect to “ordinary trading transactions.”
• Statutory underwriters may be able to sell securities without registration pursuant to the resale limitations of Rule 144 under the Securities Act.
• The emergence of a market for “reorganization securities” may raise some concerns regarding the operation of Section 1145 in facilitating secondary trading, especially in the case of equity securities:
  • The court supervised Chapter 11 process protects initial recipients, not subsequent purchasers of reorganization securities.
    • No requirement of delivery of disclosure statement for the resale.
  • Disclosure Statement, unlike a prospectus, is not governed by securities law disclosure regime.
    • Commonly guided by the securities laws in preparation of disclosure statement.
    • Combined registered exchange offers / pre-packed plans.
Consent Solicitations
Consent solicitations

• May be sought on a standalone basis or coupled with a tender or exchange offer.
  • Must be permitted under the terms of the governing indenture.
  • The TIA and most indentures do not permit consents that reduce principal or interest, amend the maturity date, change the form of payment or make other economic changes.
  • If the amendments involve a significant change in the nature of the investment, it may be considered an issuance of a “new” security.
Consent solicitations (cont’d)

• Why do a consent solicitation?
  • Amend restrictive covenants to permit a potential transaction, such as an acquisition or reorganization.
  • Modify indenture covenants that restrict or prohibit a restructuring of other debt in order to preserve “going concern” value and avoid bankruptcy.

• Concerns
  • Holders may be unwilling to consent to significant modifications because they will still hold the securities afterward.
  • Typically kept open for 10 business days.
Consent solicitations

- Exit consents are used to change significantly restrictive provisions in connection with a tender or exchange offer.
  - Given by tendering or exchanging holders (who are about to give up their securities) and bind non-tendering or non-exchanging holders.
  - Act as a useful incentive to avoid the “holdout” problem because non-tendering and non-exchanging holders are left with securities that have lost most, if not all, of their protections.
  - An issuer may include a “consent payment” to consenting holders as part of the consideration.
  - Not subject to any legal framework other than contract law principles.
Other “One-Off” Exchanges
Debt/equity swaps

• In a debt/equity swap, the issuer exchanges already outstanding debt securities for newly issued equity securities.
  
  • Lenders/bondholders hope they will receive a higher return on their investment with the equity position.
  • Issuer can benefit financially by changing its debt to equity ratio, and may also improve its credit ratings.
Debt/equity swaps (cont’d)

• Concerns
  • Any debt/equity swap is an exchange offer, so must comply with the tender offer rules for equity securities, as well as with all applicable Securities Act requirements (must either be exempt, or registered).
  • Issuer must have sufficient authorized capital, or effect an amendment to its certificate of incorporation.
  • If amount of equity securities to be issued exceeds 19.9%, the transaction may trigger national securities exchange limitations on issuance.
    • Exceeding 19.9% may require shareholder approval, which, because the issuance is dilutive, may be hard to obtain.
  • Issued security may need to contain “sweeteners” to encourage participation – these may include dividends, voting rights, etc.
Equity for equity exchanges

• An issuer exchanges a class of outstanding equity securities for newly issued equity securities of a different class.

• Concerns
  • Must ensure that the exchange is permitted under applicable state law.
  • The exchange may trigger disclosure obligations under Regulation FD, and the securities law antifraud provisions, particularly Rule 10b-5.
  • The exchange must comply with all tender offer rules and the issuer must file a Schedule TO.
  • An issuer needs to be mindful of the “going private” rules under Rule 13e-3 as well as Regulation M.
Tax Considerations
Tax Considerations

• Tax considerations for issuers
  • Cancellation of indebtedness (“COD”) income
  • Deduction for interest, original issue discount (OID), repurchase premium

• Tax considerations for holders
  • Taxable vs. tax-free exchange
Tax considerations for issuers

• An issuer may be required to recognize COD income if all or a portion of its debt has been (economically) cancelled
  • Exception for issuers in bankruptcy or that are insolvent

• Corporations that issue obligations with OID as part of their restructuring need to be mindful of potential limitations on the deductibility of this discount

• For corporations that issue certain high yield obligations with significant OID (“AHYDO”), a portion of the discount is treated as a non-deductible dividend, with the remaining discount not deductible until actually paid

• Repurchase premium may be deductible by the issuer as interest expense
  • Amount in excess of adjusted issue price
Tax considerations for issuers (cont.)

• An issuer that repurchases its debt at a discount from its adjusted issue price must recognize as ordinary income the amount of the discount
  • Applies whether purchased directly or through a third party
• An issuer that exchanges new debt for old debt will recognize ordinary COD income to the extent the adjusted issue price of the old debt exceeds the issue price of the new debt
A modification of existing debt will be treated as an exchange of such debt for new debt if the modification is “significant”

- A modification is significant only if the legal rights or obligations that are altered and the degree to which they are altered are economically significant
- Generally, modifications are “significant” if, among other things:
  - The yield changes by the greater of 25 basis points and 5% of the existing yield
  - Scheduled payments are materially deferred
    - Safe harbor equal to the lesser of 5 years or 50% of the original term
  - Modified credit enhancements change payment expectations
  - The nature of the security changes (e.g., from debt to equity or from recourse to nonrecourse)
- Consent solicitations that seek to change “customary accounting or financial covenants” would not, in themselves, be significant modifications
Tax considerations for issuers (cont.)

- An issuer engaged in a debt for equity swap will recognize ordinary COD income to the extent the adjusted issue price of the outstanding debt exceeds the fair market value of the equity it issues.
Tax considerations for holders

- Tax consequences for holders depend on whether the restructuring constitutes a “recapitalization” under the Code
  - Generally debt exchanges of securities with terms longer than 10 years will qualify as recapitalizations
  - Uncertainty with respect to securities with shorter terms
- A holder may have gain or loss equal to the difference between the amount of cash received and the holder’s adjusted tax basis in the debt
  - If the holder acquired the debt with market discount (as secondary market purchaser), a portion of any gain may be characterized as ordinary income
Tax considerations for holders (cont.)

- If an exchange or modification of debt constituted a recapitalization, the holder should generally not recognize gain or loss
  - However, depending on the terms of the new debt relative to the old, there may be tax consequences
  - If the principal amount of the new debt exceeds that of the old, the holder could recognize gain equal to the fair market value of the excess
    - Gain also recognized to the extent of “boot”
  - Exchanges and modifications also can create OID, or conversely, an amortizable premium, due to differences in the issue price of the new date and the stated redemption price at maturity
- If a debt equity swap constitutes a recapitalization, it should not result in gain or loss to the holder
  - Market discount accrued on the exchanged debt will carryover to the equity
Tax considerations for holders (cont.)

- Tax treatment of consent fees is unclear
  - Issuers typically treat as ordinary income
  - Subject to withholding tax if paid to non-US holders

- PLR 201105016
Addressing Outstanding Hybrid Securities
Transactions to consider

• Exchange offers
  • Many banks will want to consider exchange offers for their outstanding Tier 1 instruments that may not be qualifying Tier 1 going forward

• Consent solicitations
  • Many banks had entered into replacement capital covenants in connection with their hybrid issuances
  • These banks may wish to consider consent solicitations to do away with replacement capital covenants in order to gain additional flexibility for the future
  • Banks with outstanding remarketable securities may wish to consider consent solicitations to modify the terms of these securities prior to their remarketing date
Transactions to consider (cont’d)

• Remarketings
  • Modifying the terms of the remarketings
    • Many banks issued securities that must be remarketed in 2011 and 2012
    • Banks may want to evaluate alternatives to and/or modifications of remarketings, including liability management options (to address remarketing itself), or may want to participate in the remarketing, or may want to have the remarketing agent act as principal, or may want to change the terms of the instrument

• Capital treatment events
  • Banks with outstanding trust preferred securities will be considering whether the publication by the banking agencies of any proposed notice of rulemaking, request for comment, or similar, addressing regulatory capital issues will be sufficient for a “capital event” to be deemed to have occurred
Remarketings (Financial Institutions)

• On December 15, 2010, Citigroup completed a remarketing of $1,875,000,000 4.587% junior subordinated deferrable interest debentures (representing the third of four series of debt securities required to be remarketed under the terms of Citigroup’s Upper DECS Equity Units)
• On February 1, 2011, U.S. Bancorp completed a remarketing of $676,378,000 3.442% Remarketed Junior Subordinated Notes due 2016 (in connection with Normal ITS)
• On February 11, 2011, State Street completed a remarketing of $500,100,000 4.956% Junior Subordinated Debentures due 2018 (in connection with Normal APEX)
• On February 15, 2011, Wells Fargo completed a remarketing of $2,501,000,000 in principal amount of remarketable junior subordinated notes (in connection with Wachovia WITS)
Wells Fargo Remarketing

• The remarketing was structured as a sale by selling securityholders of newly issued notes obtained in exchange for remarketable junior subordinated notes
• The selling securityholders purchased the remarketable junior subordinated notes from Wachovia Capital Trust III
• The selling securityholders were Morgan Stanley and Credit Suisse
• The difference between the amount received by the selling securityholders for the newly issued notes, inclusive of accrued interest, and the price paid by the selling securityholders for the junior subordinated notes in the remarketing was approximately $6.25 per $1,000 principal amount of notes and $15,631,733.14 in the aggregate
Tax

- Tax considerations need to be taken into account for any remarketing, especially:
  - Rev. Rul. 2003-97
  - PLR 201105030
Liability Considerations
Legal challenges

• A restructuring may result in legal challenges.
  • Usually from non-participating holders who believe the value of their securities or the protections afforded by the securities has been adversely affected.
  • In addition, because the “all holders” rule does not apply to tender offers for straight debt securities, holders not offered the right to participate (for example, because the offering is limited to QIBs) may also claim that their securities are impaired.
  • If the transaction has already been completed, what remedy will be implemented?
    • Holders may no longer hold their securities, holders may hold different securities.
Legal challenges (cont’d)

• Realogy case
  • Realogy Corporation launched an exchange offer for several series of its outstanding notes for additional term loans issued pursuant to an accordion feature under its senior credit facility.
  • New loans were secured whereas the old notes were not.
  • The offer set a priority for participation that effectively precluded one class of notes (the Senior Toggle Notes) from participating.
  • The end result was this class was effectively subordinated to the classes that were able to exchange.
  • The credit facility permitted only refinancing debt that was not more senior than the debt being refinanced.
  • The trustee sued and the court interpreted the indenture and credit facility as prohibiting the transaction.
  • The exchange offer did not proceed.
Fifth Third

- SEC issued a cease and desist order against Fifth Third from committing or causing violations of Reg FD
- Fifth Third issued a redemption notice to a series of trust preferred holders, but did not initially file an 8-K or issue a press release
- Redemption notice was provided by Fifth Third to DTC (as required)
- SEC found Fifth Third failed to consider how its decision to redeem would affect investors in the market for those securities and initially failed to publicly announce the redemption, which the SEC determined was material nonpublic information
Fifth Third

- The SEC based its determination of materiality on the trading prices (security was trading at $26.50, and it was to redeemed at $25.00)
- Reminder to issuers to consider public disclosures (in addition to disclosures required by indentures) in the case of issuer tenders, repurchases, redemptions, etc.
Turkle Trust v. Wells Fargo

• A class action case was brought against Wells Fargo in connection with the redemption under a capital treatment event of certain outstanding trust preferred securities.

• In July 2012, a US District Court determined that the Collins Amendment (Sec 171) of the Dodd-Frank Act entitled the bank to redeem at any time following adoption of Dodd-Frank.

• Bank need not have considered other early redemption provisions contained in the securities nor the phase out provisions for trust preferreds.
Financial Adviser Issues
Financial advisers role

• A financial adviser may:
  • Help formulate a restructuring plan,
  • Locate and identify securityholders,
  • Structure the transaction,
  • Solicit participation,
  • Assist with presenting the structure to stakeholders,
  • Assist with rating agency discussions, and
  • Manage the marketing efforts.
Financial advisers role (cont’d)

• Debt repurchases
  • A financial adviser is in the best position to contact investors.

• Tender offers
  • May be an advisory role, or as dealer manager (if permitted).

• Private exchange offers
  • May be an advisory role or as a dealer manager.
  • Actions must not amount to a “general solicitation.”
Financial advisers role (cont’d)

• Section 3(a)(9) exchange offer
  • Limited advisory role.
  • May not earn a “success” fee.

• Registered exchange offer
  • May act as an adviser or as a dealer manager.
  • More flexibility for a registered exchange offer than others.
Remarketings

Contributed by Ze’-ev D. Eiger and Remmelt A. Reigersman, Morrison & Foerster LLP

Between 2006 and 2008, many public companies, including financial institutions, issued various types of "two-tiered" securities—a subset of hybrid securities. For example, Wachovia issued its "WITS" in January 2006 (which we discuss in more detail below) and Archer-Daniels-Midland issued its "Equity Units" in May 2008. Two-tiered securities were popular because they provided issuers with a number of advantages compared to other types of securities, including the following:

- In the case of financial institutions, favorable regulatory capital treatment (in most cases, the securities qualified as Tier 1 capital);
- Favorable ratings agency treatment (generally, Basket D treatment from Moody's and 70 percent equity treatment from Standard & Poor's (S&P)); and
- Deductions for federal income tax purposes for interest payments on the underlying debt securities.

Two-tiered securities also had remarketing features, requiring issuers to "remarket" the underlying debt securities after a certain period of time from issuance (usually five years) in order to enable holders to satisfy their obligations under related stock purchase contracts. Financial institutions issued two-tiered securities both in the form of equity units and units with a trust preferred component (both of which we discuss in more detail below), while non-financial institutions predominantly issued equity units.

Many of the debt securities underlying two-tiered securities are scheduled to be remarkedet in 2011, 2012, and 2013. Market conditions have changed significantly since the securities originally were issued. As a result, issuers may want to consider the options at their disposal with respect to these remarketings, including (1) modifying the terms of the underlying debt securities or of the remarketings; or (2) using various liability management techniques, such as repurchases, redemptions, exchange offers, and consent solicitations, in order to retire or swap out the securities themselves.

Background on Two-tiered Securities

"Two-tiered" securities are hybrid securities, which have some equity characteristics and some debt characteristics, consisting of units comprised of two paired securities. The following are examples of two-tiered securities:

- A forward stock purchase contract paired with a beneficial interest in debentures (usually referred to as "equity units"); or
- A forward stock purchase contract paired with a non-convertible trust preferred security (a structure often used by financial institutions).
In the case of a two-tiered security involving a forward stock purchase contract, the stock purchase contract commits the issuer to deliver, and the applicable trust or unit holder to purchase, a variable number of shares of common or preferred stock of the issuer at or by a specified time from issuance. The underlying debt securities are pledged as collateral by the trust or unit holder to secure the obligations of the trust or unit holder under the forward stock purchase contract.

Two-tiered securities may differ slightly based on maturity, the type of interest payment offered (fixed or floating), the specific terms of the stock purchase contract (common stock or preferred stock), the presence or absence of replacement capital covenants, the definition of tax and/or regulatory events (which may trigger a redemption or cause adjustments to the remarketing provisions), and any permitted flexibility in the remarketing process.

In the case of two-tiered securities involving trust preferred securities, the underlying securities are debt securities of the issuer that are held by the trust and serve as collateral for the trust's obligation under the forward stock purchase contract. The trust distributes to its beneficial holders (i.e., the holders of trust preferred securities) any amounts it receives on its assets (i.e., the interest payments on the underlying debt securities). In addition, the underlying debt securities typically are subordinated to the issuer's senior and subordinated indebtedness and usually are redeemable at the issuer's option, but only after a certain period of time (typically 10 years).

Case Study (Wachovia WITS)

In January 2006, Wachovia Corporation (Wachovia) issued to the Wachovia Capital Trust III, an investment unit consisting of remarketable junior subordinated notes with a 36-year term and a five-year forward stock purchase contract on Wachovia non-cumulative perpetual preferred stock. The trust, in turn, issued beneficial interests—Wachovia Income Trust Securities (WITS)—to investors. After five years, the junior subordinated notes were scheduled to be remarketed, and the proceeds from the remarketing would be used to exercise the forward stock purchase contract to purchase the non-cumulative perpetual preferred stock. If the junior subordinated notes were not remarketed, then the trust could deliver the notes to the issuer as payment for the non-cumulative perpetual preferred stock. A contractual replacement provision required that funds used for redemption of the WITS had to originate from the proceeds of the issuance of common stock, perpetual or long-dated non-cumulative preferred stock, or certain other allowed instruments received within 180 days of redemption.

At the time of issuance, S&P viewed the WITS as two separate transactions. Wachovia benefited from payment deferral, although S&P noted that the term of the junior subordinated notes was too short to obtain equity credit. However, the non-cumulative perpetual preferred stock had strong equity-like characteristics. Moody's assigned the WITS D-basket treatment. On maturity, the WITS received a "strong" ranking. On ongoing payments, distributions were deferrable for seven years and had to be settled using common stock. The forward stock purchase contract obligated Wachovia to sell non-cumulative perpetual preferred stock to holders in five years. The perpetual preferred stock was callable immediately, subject to a replacement capital provision. As to ongoing payments, the WITS received a "moderate" ranking. On loss absorption, the WITS ranked "strong." Finally, the junior subordinated note and the forward stock purchase contract were treated as two separate instruments for federal income tax purposes and the interest payments on the junior subordinated notes were deductible for federal income tax purposes.

The diagram below summarizes the principal features of the transaction.
Upon a remarketing, the issuer engages an agent to help sell or "remarket" the underlying debt securities. The remarketing agent does not necessarily have to be the same investment bank involved in the initial offering of the two-tiered securities. The remarketing agent is paid a fee for services provided in the remarketing and agrees to use commercially reasonable efforts to sell the underlying debt securities, typically at a price that will ensure net proceeds of at least 100 percent of their remarketing value. The remarketing value typically is the present value of principal and interest payments on the underlying debt securities using a reset rate as the discount rate. The net proceeds from the remarketing then are used to settle the obligations under the stock purchase contract.

In a remarketing, the interest rate on the underlying debt securities may be reset (higher or lower), which is referred to as the "reset rate." The relevant supplemental indenture typically specifies an interest rate reset cap for the remarketing.

A specific date is set for the first remarketing (initial remarketing). A remarketing is "successful" if the remarketing agent is able to resell the underlying debt securities offered in the remarketing at a price resulting in net proceeds at least equal to the amount due the issuer under the stock purchase contract. If the initial remarketing is unsuccessful, the issuer will then attempt subsequent remarketings (which usually will be conducted quarterly). The remarketing process also may be moved up under certain circumstances. For example, in the case of two-tiered securities issued by financial institutions, the remarketing process may be accelerated in the event that certain capital ratios (e.g., total risk-based capital, Tier 1 risk-based capital, and leverage capital) decrease below certain threshold levels or the trust itself is dissolved.

Some two-tiered securities contemplate the remarketing of the underlying debt securities as senior notes, while others contemplate the remarketing of the underlying debt securities as subordinated notes or as an entirely new security. Flexibility ultimately will depend on the terms of the base indenture, the relevant supplemental indenture, the remarketing agreement, and any tax constraints. Note that some base indentures may require the consent of both senior and subordinated noteholders to change any relevant subordination provisions (the underlying debt securities generally are subordinated). The choice of remarketing instrument will depend ultimately on market demand and on the terms of the base indenture and the relevant supplemental indenture, with the additional goal of avoiding adverse tax consequences.

If the remarketing agent is unable to remarket the underlying debt securities successfully by the end of a certain number of remarketing periods (usually five), then (1) the interest rate will not be reset and the underlying debt securities will continue to accrue interest, and (2) the underlying debt securities will be delivered to the issuer as payment under the stock purchase contract (through the collateral agent). Note that a failed remarketing may have negative consequences for the issuer, including a ratings downgrade, negative impact on
the issuer’s stock price, and potentially negative tax consequences.

**Documentation**

The remarketing process is governed by the terms and provisions of a remarketing agreement and the relevant supplemental indenture. However, the remarketing is conducted much like a typical registered offering.

A remarketing generally will require the issuer to provide various notices and issue certain press releases. Usually there is a notice from the issuer to the trustee and the remarketing agent as well as a press release announcing the commencement of the remarketing. There also may be required notices for the collateral agent, the property trustee, and, in the case of two-tiered securities with a trust preferred component, the Delaware trustee. Another press release typically is required to announce whether the remarketing was successful or unsuccessful. As a result of the notices and press releases, the remarketing process is highly visible to the market.

The remarketing agent also may require its counsel to deliver a legal opinion to the trustee. This opinion may include the following opinion points:

- Consent from noteholders is not required for the remarketing (including for any change to or the complete removal of any subordination provisions);
- No governmental or regulatory consent or approval is required for the remarketing; and
- A supplemental indenture is not required for the remarketing (if applicable).

Note that other opinion points may be required depending on the complexity of the remarketing and the remarketing instrument.

With respect to offering documents, a prospectus supplement and a free writing prospectus (FWP) final term sheet typically are prepared and filed with the Securities and Exchange Commission (SEC). The issuer and the remarketing agent will enter into a pricing agreement, which incorporates the terms of the remarketing agreement and includes as an exhibit the FWP final term sheet. The issuer, remarketing agent, and trustee also will execute the remarketing agreement, if it has not already been executed, and a new supplemental indenture, if needed. The pricing agreement, the remarketing agreement, and, if needed, the supplemental indenture then are filed with the SEC on Form 8-K.

With respect to closing documents, the new or old supplemental indenture may require various supporting documents, including officers’ certificates, opinions of counsel, and instructions and confirmations required under the related collateral agreement.

**Issuer Participation**

Issuers may participate in their own remarketings if permitted under the relevant supplemental indenture and/or remarketing agreement. Issuers may choose to participate in their own remarketings for various reasons, including the following:

- High likelihood that a traditional remarketing may be unsuccessful;
- Strong signal to the market; and
- Efficiency (e.g., sufficient cash on hand).

However, issuer participation may run afoot of the market-making prohibitions under Rule 102 of Regulation M (Reg M) under the Securities Exchange Act of 1934 (Exchange Act), as amended.

**Regulation M**

Rule 102 of Reg M prohibits an issuer, selling securityholders, and their affiliated purchasers from bidding for, purchasing, or attempting to induce any
person to bid for or purchase, any covered security during the applicable restricted period. Certain securities, however, are "excepted," including "actively traded" securities (Rule 102(d)(1)) and investment grade non-convertible or asset-backed securities (Rule 102(d)(2)). In addition, there is SEC no-action letter guidance that suggests that issuers may participate in their own remarketings. See SEC No-Action Letter to UnumProvident Corp. (Feb. 8, 2007); SEC No-Action Letter to TECO Energy, Inc. (Oct. 8, 2004).

UnumProvident Corporation

In UnumProvident Corporation, the securities were Adjustable Conversion-rate Equity Security (ACES) units of UnumProvident Corporation (UnumProvident). Each ACES unit consisted of (1) a purchase contract for common stock, and (2) an ownership interest in a UnumProvident senior note. The senior notes were pledged as collateral to secure payment of the purchase price under the stock purchase contract and the proceeds from the remarketing of the senior notes were to be used for the purchase price under the stock purchase contract. The senior notes did not provide for early redemption, they were not listed, there was no public market for them, and they were not investment grade. UnumProvident proposed to retire the senior notes and, because the notes did not provide for early redemption, it sought to purchase the notes in the remarketing.

In providing no-action relief and granting UnumProvident an exemption from Rule 102 of Reg M for participating in its own remarketing, the SEC staff highlighted the following facts:

- UnumProvident would not make any bids for or purchases of the senior notes or any reference security during the restricted period other than pursuant to the remarketing;
- UnumProvident would bid for and purchase senior notes in the remarketing solely for the purpose of retiring the notes it purchased; and
- The terms of the remarketing and UnumProvident's intention to bid for, purchase, and retire the senior notes would be disclosed fully in a prospectus supplement and other remarketing materials.

TECO Energy, Inc.

In TECO Energy, Inc., the securities were Adjustable Conversion-rate Equity Security Units (Units) of TECO Energy, Inc. (TECO) and a trust created by the company, TECO Capital Trust II (Trust). Each Unit consisted of (1) a purchase contract obligating the unitholder to purchase from TECO a specified fraction of a newly-issued TECO common share, and (2) a trust preferred security (TRUPS) of the Trust. A limited liability company (LLC) held the interests in the Trust and TECO owned all the outstanding voting interests in the LLC. The original terms of the Units and the TRUPS provided for a remarketing of the TRUPS for purposes of applying the proceeds to the purchase price under the stock purchase contract. The TRUPS were not listed, there was no public market for them, and they were not investment grade. TECO initially tendered for the TRUPS, but there were still TRUPS outstanding following the tender. TECO then proposed to retire the remaining TRUPS outstanding, and because they did not provide for early redemption, and another tender was unlikely to result in the tender of such amount, TECO sought to purchase the TRUPS in the remarketing.

In providing no-action relief and granting TECO an exemption from Rule 102 of Reg M for participating
in its own remarketing, the SEC staff highlighted the following facts:

- The TRUPS in the remarketing would have a fixed price, determined by the bids of prospective investors not including TECO;
- The remarketing would be directed to a group of institutional investors during a short period of time;
- TECO would not make any bids for or purchases of the TRUPS or any reference security during the restricted period other than pursuant to the remarketing;
- TECO would bid for and purchase TRUPS in the remarketing solely for the purpose of retiring TRUPS it purchased, the corresponding number of company preferred securities, and the corresponding principal amount of the subordinated notes underlying the TRUPS; and
- The terms of the remarketing and TECO’s intention to bid for, purchase, and retire the TRUPS, the corresponding number of company preferred securities, and the corresponding principal amount of subordinated notes underlying the TRUPS would be fully disclosed in a prospectus supplement and other remarketing materials.

Considerations

For issuers deciding to participate in a remarketing, there are a number of things to consider. First, issuers should monitor investment ratings for the underlying debt securities to see if they qualify for the exception available under Rule 102(d)(2) of Reg M. Second, issuer participation in a remarketing should be disclosed in the prospectus supplement for the remarketing. Third, compliance with the anti-fraud and anti-manipulation provisions of the federal securities laws (i.e., Section 10(b) of the Exchange Act and Rule 10b-5 thereunder) still is required for issuers. Fourth and most importantly, issuer participation raises substantial tax issues that need to be vetted before proceeding with the remarketing.

Alternatives to, and Modifications of, Remarketings

There are various theoretical alternatives to, and modifications of, remarketings available to issuers that have particular advantages and disadvantages and that may or may not be possible depending on the circumstances. The alternatives to a remarketing are various liability management techniques, which include the following:

- Redemptions;
- Repurchases;
- Debt tenders;
- Private exchange offers;
- Exchange offers under Section 3(a)(9) of the Securities Act of 1933 (Securities Act), as amended
- Registered exchange offers;
- Debt for equity exchanges;
- Equity for equity exchanges; and
- Consent solicitations.

Any modification of the terms of a remarketing will depend on the relevant supplemental indenture and/or remarketing agreement. Examples of modifications include the following:

- Issuer participation;
- Remarketing agent participation as principal; and
- Changing the remarketing instrument (e.g., seniority, tenor, debt to equity).

Capital Issues for Financial Institutions

As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Basel III framework, financial institutions now will face more stringent capital requirements. This will impact the types of securities, including hybrid
securities, which financial institutions issue in the future, that will qualify for favorable regulatory capital treatment. New types of hybrid securities are being developed (e.g., contingent capital securities) and will be created in the future, while other types of hybrid securities will become less prevalent.

Under Section 171 of Dodd-Frank (also referred to as the Collins Amendment), the capital requirements for banks now will apply to bank holding companies. This is significant because many bank holding companies have trust preferred securities outstanding. As a result, two-tiered securities with a trust preferred component will not be included in Tier 1 capital.

In the case of two-tiered securities with a forward stock purchase contract, the common stock or preferred stock issued pursuant to the forward contract would be treated under Basel III as Tier 1 capital and the remarried notes would be treated as Tier 2 capital. Although dependent on clarity from U.S. regulators regarding the capital treatment of contingent capital securities, the remarried notes also might be treated as Tier 1 capital if the notes have principal write-down or equity conversion features (upon capital ratios falling below certain threshold levels).

Modifications of Remarketings

There are various modifications that can be made to remarketings, each with their own separate considerations. The tables below show the alternatives available to issuers, including modifications made prior to the remarketing date, modifications made during the remarketing, and modifications to the remarketing instrument itself, as well as considerations to keep in mind (which may preclude the viability of the alternatives).

<table>
<thead>
<tr>
<th>Pre-Remarketing Date:</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Alternatives</td>
<td>Considerations</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Repurchase equity units on opportunistic basis</th>
<th>Requires cash on hand or a separate, concurrent offering</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most effective when issuer knows holders</td>
<td>May only retire a small percentage of securities from a limited number of holders</td>
</tr>
<tr>
<td>May trigger disclosure obligations</td>
<td>May trigger tender offer rules</td>
</tr>
<tr>
<td>May be restricted by a replacement capital covenant, if applicable</td>
<td></td>
</tr>
<tr>
<td>May result in accounting gain</td>
<td>Non-repurchased portion will remain outstanding</td>
</tr>
<tr>
<td>In the case of financial institutions, may need Federal Reserve discussions or approval</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Exchange offer (tender) for equity units</th>
<th>Time consuming (subject to SEC review and filing requirements)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must remain open for 20 business days (if subject to the</td>
<td></td>
</tr>
</tbody>
</table>
tender offer rules)

Liability under Section 11 of the Securities Act (more expensive than an unregistered exchange offer or repurchase)

Holdout issue

Must pay all investors of the same class the same price (if subject to the tender offer rules)

Consent solicitation to obtain consent relating to the terms of the remarketing (or of the security into which issuer can remarket)

Depending on holders, may prove expensive

Can be completed quickly

Remarketing:

<table>
<thead>
<tr>
<th>Alternatives</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issuer can (itself) participate in or “support” remarketing</td>
<td>Tax sensitive (requires vetting)</td>
</tr>
<tr>
<td>Remarketing agent can participate as “principal”</td>
<td>Tax sensitive (requires vetting)</td>
</tr>
<tr>
<td>Third party financial intermediary can act as “standby purchaser” in</td>
<td>Tax sensitive (requires vetting)</td>
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Remarketing Instrument:

<table>
<thead>
<tr>
<th>Alternatives</th>
<th>Considerations</th>
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<tr>
<td>Change seniority</td>
<td>Tax sensitive (requires vetting)</td>
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<tr>
<td>Change tenor</td>
<td>Tax sensitive (requires vetting)</td>
</tr>
<tr>
<td>Other changes</td>
<td>Tax sensitive (requires vetting)</td>
</tr>
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</table>

Recent Developments

There have been a number of remarketings completed recently by financial institutions. For example, on December 15, 2010, Citigroup completed a remarketing of $1,875,000,000 in principal amount of its 4.587 percent junior subordinated deferrable interest debentures, representing the third of four series of debt securities required to be remarkeated under the terms of Citigroup’s Upper DECS Equity Units. On February 1, 2011, U.S. Bancorp completed a remarketing of $676,378,000 in principal amount of its 3.442 percent Remarked Junior Subordinated Notes due 2016 (in connection with its Normal ITS). On February 11, 2011, State Street completed a remarketing of $500,100,000 in principal amount of its 9.56 percent Junior Subordinated Debentures due 2018 (in connection with its Normal APEX). On February 15, 2011, Wells Fargo completed a
remarketing of $2,501,000,000 in principal amount of its remarketable junior subordinated notes (in connection with Wachovia WITS).

There also have been a number of remarketings completed recently by non-financial institutions. For example, on May 15, 2010, Stanley Black & Decker completed a remarketing of $8,694,000 in principal amount of its Floating Rate Convertible Senior Notes due May 17, 2012 (in connection with its Floating Rate Equity Units). On November 15, 2010, Avery Dennison completed a remarketing of $109,352,000 in principal amount of its 5.350 percent Senior Notes due 2020 (in connection with its HiMeds Units). On March 4, 2011, Reinsurance Group of America completed the remarketing of its preferred securities triggered by the redemption of warrants (in connection with its Trust PIERS Units). On April 4, 2011, Archer-Daniels-Midland completed a remarketing of $1,750,000,000 in principal amount of its 4.70 percent Debentures due 2041 (in connection with its corporate units).

Wells Fargo Remarketing

The Wells Fargo remarketing completed on February 15, 2011, was slightly different from the other recent remarketings in that there was an exchange offer component to the remarketing. The Wells Fargo remarketing included the following steps: (1) selling securityholders (Morgan Stanley and Credit Suisse) sold senior notes, newly issued by Wells Fargo, to the public; (2) the selling securityholders purchased the remarketable junior subordinated notes from Wachovia Capital Trust III with the proceeds from the senior notes sale; and (3) the remarketable junior subordinated notes were delivered by the selling securityholders to Wells Fargo as payment for the senior notes. The proceeds from the sale of the junior subordinated notes to the selling securityholders then were used to settle the obligations of Wachovia Capital Trust III under the related forward stock purchase contract. The difference between the amount received by the selling securityholders for the newly issued notes, inclusive of accrued interest, and the price paid by the selling securityholders for the junior subordinated notes in the remarketing was approximately $6.25 per $1,000 principal amount of notes and $15,631,733.14 in the aggregate.

Federal Income Tax Considerations

Federal income tax considerations are very important and must be taken into account for any remarketing. Federal income tax considerations will depend on the specific terms of the remarketing and/or any modifications made to the terms of the remarketing. Finally, federal income tax considerations with respect to any liability management techniques used by issuers also must be taken into account.

Conclusion

Issuers of two-tiered securities should remember that they have flexibility with respect to their remarketings, which may include modifications to the remarketing process itself or the use of liability management techniques (e.g., repurchases, redemptions, exchange offers, and consent solicitations) to retire or swap out the securities themselves. The feasibility of any of these options ultimately will depend on the particular terms of the relevant indenture and/or remarketing agreement (e.g., permitted modifications to the remarketing instrument and any required consents) and the relevant federal income tax considerations. The success of both recent and upcoming remarketings also may influence whether two-tiered securities remain popular in the future with both financial and non-financial issuers and whether issuers provide any enhancements to the standard remarketing provisions based upon market experience.

Ze’ev D. Eiger is Of Counsel in the Capital Markets Group in the New York office of Morrison & Foerster. Mr. Eiger’s practice focuses on securities and other corporate transactions for both foreign and domestic companies. He represents issuers, investment banks/financial intermediaries, and
investors in financing transactions, including public offerings and private placements of equity and debt securities. Mr. Eiger also works with financial institution clients in the equity derivative markets, focusing on designing and structuring new products and assisting with offerings of equity-linked debt securities.

Remmelt A. Reigersman is an Associate who focuses on federal and international tax matters. Mr. Reigersman regularly advises on complex cross-border investment and financing transactions.

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1. Trust preferred securities are securities that are issued by a Delaware statutory trust formed by the issuer, which holds all of the common interests in the trust. The securities offered to investors represent undivided preferred beneficial interests in the trust, and the trust invests the offering proceeds in subordinated long-dated (typically at least 30 years) debt securities of the issuer.

2. Replacement capital covenants generally are covenants whereby the issuer agrees for the benefit of holders of senior debt securities that the issuer will not redeem, repay, or purchase subordinated debt securities or more junior debt securities unless the proceeds used for such redemption, repayment, or purchase originate from the issuance of equity or equity-like securities.

3. Tax or regulatory events refer to changes in the tax or regulatory treatment of the securities.

4. A new supplemental indenture will be needed if the terms of the underlying debt securities will be changed (e.g., maturity, seniority, etc.). In the case of a remarketing with a "stand-by purchaser" (which we discuss below in "Alternatives to, and Modifications of, Remarketings — Modifications of Remarketings"), the issuer also will enter into a note purchase agreement (for the purchase of the underlying debt securities) with the stand-by purchaser, as well as a registration rights agreement, if needed.


6. This alternative could be combined with an exchange offer (tender) as in the Wells Fargo remarketing discussed below in "Recent Developments – Wells Fargo Remarketing."

7. U.S. Bancorp previously had completed on June 10, 2010 an exchange offer of 547,622 depositary shares, each representing a 1/100th interest in a share of its Series A preferred stock, for $547,622,000 in aggregate principal amount of its Normal ITS.

8. Internal Revenue Service Revenue Ruling 2003-97 addresses the federal income tax consequences of two-tiered securities.

9. The Internal Revenue Service has issued a private letter ruling addressing a restructuring of two-tiered securities following a change in circumstances.
Editor’s Note

When U.S. voters go to the polls on November 6, they may not understand much about the respective candidates’ tax policies but that won’t be because Tax Talk didn’t try. In this issue we continue our quadrennial review of the Republican and Democratic presidential candidates’ tax proposals. Unfortunately, as you will observe, details are in short supply. No matter who wins, however, taxpayers face an uncertain tax landscape with 2013 right around the corner. Tax reform is again in the air (or maybe just a six month extension of current law until the next Congress figures out what to do). Anyway, our regular readers will realize we are fixated on FATCA (www.KNOWFatca.com) and Q3 is no different. In this issue, we report on the first “FATCA substitute” intergovernmental agreement announced on September 14th between the United States and the United Kingdom. The agreement provides for information sharing between the two countries and gives a FATCA pass to participating UK financial institutions. In other tax news, the IRS issued a private letter ruling that income from excess mortgage servicing qualifies as a good REIT asset and produces good REIT income. We suspect this ruling will be the foundation on which a new class of REITs will be constructed. Also, after several disappointing taxpayer defeats, the Tax Court finally took the taxpayer’s side on a debt-equity case in Pepsico Puerto Rico, Inc. v. Commissioner. In Dorrance v. United States, a Federal District Court ruled on the tax consequences of demutualizing an insurance company. In CCA 201238025, the IRS addressed whether the taxpayer was a dealer in trust preferred securities and whether a one-year cessation of dealer activities during the height of the illiquid markets during the financial crisis meant the taxpayer was not a dealer in securities under Section 475. In the area of foreign currency transactions, the IRS promulgated proposed and final regulations addressing “legging in” and “legging out” of foreign currency integration elections. Finally, in Bartlett v. Commissioner, the Tax Court rejected a taxpayer’s attempt to blame TurboTax for underreporting income. Nice try. Our regular section, Mofo in the News, is included as well.
Obama v. Romney Tax Plans

With the presidential election in the final stretch, Barack Obama and Mitt Romney have laid out tax plans that represent different fundamental beliefs about the tax code. This chart outlines some of the major differences between the plans.

<table>
<thead>
<tr>
<th></th>
<th>President Obama</th>
<th>Mitt Romney</th>
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</thead>
<tbody>
<tr>
<td><strong>Individual Tax Rates</strong></td>
<td>Maintain current rates for taxpayers earning up to $250,000 per year; increase rates for two highest brackets</td>
<td>Reduce all individual rates 20 percent</td>
</tr>
<tr>
<td><strong>Estate Tax</strong></td>
<td>Restore 45 percent estate tax after $3.5 million exemption, instead of current 35 percent estate tax after $5 million exemption</td>
<td>Eliminate the estate tax</td>
</tr>
<tr>
<td><strong>Investment Income</strong></td>
<td>Tax dividends at ordinary rates for two highest brackets</td>
<td>Eliminate 3.8 percent Medicare tax; eliminate tax on dividends for individuals making less than $200,000</td>
</tr>
<tr>
<td><strong>Capital Gains</strong></td>
<td>Increase tax on capital gains from 15 percent to 20 percent for two highest brackets</td>
<td>Eliminate tax on capital gains for individuals making less than $200,000</td>
</tr>
<tr>
<td><strong>Corporate Tax</strong></td>
<td>Lower top rate from 35 percent to 28 percent</td>
<td>Lower top rate from 35 percent to 25 percent; move international taxation of corporations to a territorial system</td>
</tr>
</tbody>
</table>

Source: www.barackobama.com/taxes www.mittromney.com/issues/tax

IRS Rules
That Excess Mortgage Servicing Is “Good” Asset and Produces “Good” Income for REIT Purposes

PLR 201234006 (August 24, 2012) answers the long-asked question whether “excess” mortgage servicing can be a good REIT asset and produce good REIT income. The answer is yes, and we expect a number of offerings of REITs formed to hold “excess” mortgage servicing.

In the ruling, a mortgage servicer received mortgage servicing fees on mortgage pools that it serviced. The servicing fee was a fixed percentage of the mortgage principal balance. The mortgage servicing fee consisted of a reasonable fee for services and an “Excess Servicing Spread,” representing the servicing fee in excess of a reasonable servicing fee. The taxpayer proposed to spin off a real estate investment trust (“REIT”) that would purchase and hold the Excess Servicing Spread.

The IRS treated the Excess Servicing Spread as a “coupon strip” under Section 1286. The ruling also holds that for REIT purposes, the Excess Servicing Spread is an interest in a mortgage on real property and therefore a qualifying “real estate asset” for REIT purposes. Moreover, the ruling holds that the Excess Servicing Spread coupon strip produces qualifying income for REIT purposes.

Historically, practitioners wondered whether a coupon could be a qualified “real estate asset” when the REIT did not actually own an interest in the mortgage loan principal. The ruling answers the question in the affirmative and will pave the way for REITs to be set up to acquire these amounts from banks. In particular, because master servicing rights under Basel III are subject to relatively unfavorable regulatory capital treatment in that they may be subject to at least partial deduction from common equity Tier 1 capital and penalty risk-weightings it may be attractive for a bank to separate its servicing into reasonable servicing fees and excess servicing and sell off the excess portion to reduce the unfavorable regulatory capital charge associated with servicing rights. The private letter ruling, however, is issued to the taxpayer that requested it and cannot be relied upon by other taxpayers.

Tax Court Finds Arrangement to Be Equity for Tax Purposes in PepsiCo Puerto Rico, Inc. v. Commissioner

In PepsiCo Puerto Rico, Inc. v. Commissioner, the U.S. Tax Court found that PepsiCo’s “advance agreements” between two PepsiCo U.S. subsidiaries and a Netherlands affiliate were equity

(Continued on Page 3)
Pepsico Puerto Rico, Inc. v. Commissioner

(Continued from Page 2)

rather than debt for federal income tax purposes. This, in turn, permitted the PepsiCo U.S. subsidiaries to treat payments on the advance agreements as nontaxable returns of capital rather than interest payments for the taxable years in question.

PepsiCo designed the advance agreements to be equity for U.S. tax purposes and debt for Dutch tax purposes. They were used to fund PepsiCo’s international expansion during the 1990s. To create the advance agreements, PepsiCo contributed notes issued by Frito Lay Inc. to the Netherlands affiliate. Interest on the Frito Lay notes paid to the Netherlands affiliate was deductible by Frito Lay in the U.S. and exempt from U.S. withholding tax under the U.S.-Netherlands tax treaty. The structure was designed, however, so that payments on the advance agreements, which mirrored interest payments on the Frito Lay notes, were distributions on equity and not includible in PepsiCo’s taxable income.

The advance agreements provided for 40-year terms plus a potential 10-year extension at the issuer’s option (which could then be followed by another five-year extension). If any affiliate loan receivables held by the issuer (i.e., the Netherlands affiliate) defaulted, the advance agreements became perpetual. The advance agreements accrued a preferred return, but the preferred return was payable by the issuer only under certain circumstances including that the issuer’s net cash flow exceeded its operating expenses and capital expenditures. The advance agreements were subordinate to all of the issuer’s indebtedness.

The IRS had argued that the advance agreements were debt for federal income tax purposes. It pointed to PepsiCo’s discussions with Dutch tax authorities that focused on treating the instruments as debt for Dutch tax purposes. It also pointed to the subordination features, the long term, and the fact that the instruments were not equity under local law.

The Tax Court (Judge Goeke), however, found that the advance agreements constituted equity for federal income tax purposes. The Court looked at 14 debt-equity factors found in Fin Hay Realty v. U.S.  Although a maturity date is necessary for debt, the Tax Court found that a receivable default that converted the advance agreements to perpetual instruments was possible. It also found that the subordination and the intent of the parties indicated equity.

The case is one of the few instances in the past few years where a taxpayer’s characterization of an instrument as debt or equity has been upheld by the courts. IRS victories in TIFD III, Hewlett-Packard, and Pritired found that purported equity instruments were actually debt for federal income tax purposes. One distinguishing factor is that, at least according to the court, PepsiCo entered into the transaction to fund its expanding overseas business rather than creating a transaction to result in U.S. tax benefits, a factor that to a greater or lesser degree was present in each of the other cases.

At issue in Dorrance v. United States was the proper tax treatment of stock received by taxpayers during the process of demutualization of a mutual insurance company.

In 1995, the taxpayers formed a trust that purchased five life insurance policies so that, upon the death of the taxpayers, their heirs would have liquidity to pay estate taxes and would not be forced to liquidate the family stock portfolio. The five life insurance policies were purchased from mutual insurance companies. Policyholders in a mutual insurance company are given certain rights in addition to their life insurance policy; they vote on corporate decisions and are given surplus if the company should liquidate. The court decision refers to these rights as “mutual rights.” From 1995 until 2001, the five mutual life insurance companies servicing the taxpayers’ policies were all demutualized. In a demutualization, the mutual insurance company becomes a standard stock company under local law and the policyholders (who must approve the demutualization process) are given the option of accepting cash or stock in return for their mutual rights, but their policies remain unchanged and they continue to pay the same premium.

The taxpayers chose to accept stock worth nearly $1.8 million, which they later sold for $2.2 million. The taxpayers paid tax upon sale of the stock following IRS policy that no basis was attributable to the mutual rights. The taxpayers then sued for a refund in the Arizona Federal District Court.

The court in Dorrance was presented with competing motions for summary judgment from the government and from the taxpayers. The government sought summary judgment on the grounds that the entirety of the premiums paid by the taxpayers was paid to purchase the policy and, therefore, no basis should be allocated to the mutual rights. The taxpayers, on the other hand, argued that the open transaction doctrine should apply. Under this approach, the amount realized on the sale of the stock would

Court Addresses Demutualization Tax Treatment in Dorrance v. United States

3 398 F.2d 694 (3d Cir. 1968).
6 110 AFTR 2d 2012-5176.
represent a return of capital on the entire amount of premiums paid by the taxpayers, resulting in no tax. The end result would be that the gain would never be taxed, assuming the insured died (in which case the amount of premiums paid would be irrelevant).

The open transaction doctrine allows a taxpayer to offset gain from the sale of a portion of property against the entire basis in the property. The taxpayers cited another demutualization case, Fisher v. United States,7 in which the taxpayer successfully argued that the entire amount of premiums paid during the life of the policy was a capital investment and cash received upon demutualization was a return of capital on the investment.

The Dorrance court struck a middle path by denying both summary judgment motions and finding that the basis should be equitably apportioned among the assets. The government’s argument was rejected because the taxpayer had shown that it had paid something for the mutual rights. The court also found, however, that the open transaction doctrine should apply only in “rare and exceptional” circumstances. The court found that demutualization was not such a rare and exceptional circumstance, and the taxpayer’s basis in the combined policy and mutual rights could be equitably apportioned between the divided assets.

The court did not address which method of apportionment would be most appropriate but noted two approaches that seemed reasonable. First, the basis allocated to the policy could be inferred by comparing the cost of the policy to comparable life insurance policies issued by nonmutual insurance companies. On the other hand, some commentators suggest that it would be more appropriate to apportion basis by comparing the fair market value of the policy and the stock at the time of demutualization.

United States and United Kingdom Enter into FATCA Cooperation Agreement

On September 14, the United States and the United Kingdom announced an intergovernmental agreement “To Improve Internal Tax Compliance and to Implement FATCA.” The agreement is the first of its kind although the U.S. has announced negotiations on similar agreements with several other countries.

The gist of the Cooperation Agreement is that U.S. and UK financial institutions will report information to their respective governments about citizens from the other country that hold accounts at the financial institution. For example, UK financial institutions will report information about U.S. persons that hold accounts with the UK financial institution to the U.K. government. The U.S. and UK tax authorities will then automatically share this information under the information exchange provisions of the U.S.-UK Income Tax Treaty.

The benefit of the Cooperation Agreement is that a “Reporting United Kingdom Financial Institution” gets an exemption from the FATCA Section 1471 withholding tax so long as it supplies the required information to the UK government. It must also (i) for 2015 and 2016, report to the UK tax authorities the name of each Nonparticipating Financial Institution (“NFI”) to which it makes payments (and their amount), (ii) comply with certain registration requirements for financial institutions in partner jurisdictions (i.e., those countries that have also signed cooperation agreements with the U.S.), and (iii) either withhold on payments of U.S. source withholdable payments made to NFIs or provide information to the next person up the chain information with respect to such NFI that would permit that person to withhold.

Another key feature of the Cooperation Agreement is the extensive list of exemptions. These are entities that will be treated as FATCA compliant. They include UK pension schemes, UK nonprofit organizations, and U.K. financial institutions with a local client base including credit unions, industrial and provident societies, and building societies among others.

Automatic information exchange under the Cooperation Agreement must occur before September 30, 2015 for 2013 and by September 30 of the following year for calendar years beginning with 2014.

IRS Issues Guidance on Dealer Status

The IRS issued a Chief Counsel Advice Memorandum on September 21, 2012, addressing whether a taxpayer (a parent company) that regularly bought and sold securities qualified as a dealer, despite one year in which the taxpayer suspended its trading activities due to distressed markets.

In CCA 201238025, the taxpayer regularly bought trust preferred securities (TruPs) from various regional banks, warehousing them in trusts formed by its subsidiary. The TruPs were “repackaged” and combined with other debt sold by insurance companies and REITs, and once enough debt was accumulated, the trust would issue securities to third-party investors. The taxpayer received a warehousing fee from the issuers of the trust securities. In earlier years, the taxpayer did not report any gain or loss on the TruPs, but as the securitization market began to dry up, the taxpayer was forced to retain the TruPs for longer periods of time. In these later years,
Dealer Guidance

(Continued from Page 4)

the taxpayer began to mark to market its losses, claiming that it had always marked to market the TruPs but never had occasion to in prior years.

The IRS first dealt with the preliminary issue of whether the taxpayer qualified as a dealer in securities, and if so, whether it ceased to qualify once the securitization market dried up. The IRS found that the taxpayer was engaged in the buying and selling of securities, as evidenced by the taxpayer’s buying debt from regional banks and selling to the trusts. The IRS then analyzed whether the taxpayer was buying and selling securities to customers and noted that courts had traditionally looked to how the taxpayer was compensated. In concluding that the taxpayer was compensated through its function as a “middleman,” indicative of a dealer, rather than through a rise in value indicating an investment, the IRS looked to the fact that the taxpayer served as a middleman that brought together buyers and sellers. Finally, despite the fact that the taxpayer ceased to sell TruPs in later years, the IRS concluded that “the Service should not take the position that a taxpayer no longer qualified as a dealer because it held securities rather than [sic] sold them at severely distressed market prices during this time.”

The IRS then addressed whether the taxpayer made an unauthorized change in accounting by marking to market its TruPs in later years. Although the taxpayer did not report any mark to market gains or losses in prior years, the IRS noted that there was a possibility that this was due to the fact that there was no gain or loss to report in these years. The taxpayer claimed that it did not have gain or loss in these years because it always bought and sold at par value, which at all times equaled fair market value. The Chief Counsel Advice concluded by advising the Area Counsel to inquire whether there were any gains or losses in earlier years according to the taxpayer’s financial statements.

IRS Releases Regulations on Integrated Hedging Transactions of Qualifying Debt

On September 6, 2012, the IRS issued final and temporary regulations addressing foreign currency denominated debt that is hedged by a combination of multiple hedging transactions. In general, Treas. Reg. 1.988-5 permits taxpayers to integrate a qualifying debt instrument with a hedge in order to create a synthetic debt instrument that is treated as an integrated economic transaction. If the taxpayer disposes of either the qualifying debt instrument or the hedge but retains the other piece, the taxpayer is said to have “legged out” of the integrated transaction. In addition to recognizing gain or loss on the transaction actually disposed of, the taxpayer is deemed to have disposed of the other piece for its fair market value. The purpose of the deemed disposition is that the gain or loss on the actual disposition will be offset by the gain or loss on the deemed disposition.

When hedging a qualifying debt instrument, taxpayers may enter into multiple transactions whose effect in the aggregate is to hedge a qualifying debt instrument in a particular way. For example, a taxpayer that receives a fixed-rate loan denominated in British pounds may wish to hedge against currency risk by entering into a currency swap that, when integrated with the loan, has the economic effect of creating a synthetic debt instrument that is a fixed-rate loan denominated in U.S. dollars. If the taxpayer also wishes to hedge against fluctuations in interest rates, the taxpayer may further enter into an interest rate swap that, when combined with the already-integrated transaction, has the economic effect of creating a new synthetic debt instrument that has a variable rate and is denominated in U.S. dollars. In this case, the qualifying debt instrument is hedged by two financial contracts, a currency swap and an interest rate swap. The integration rules allow the taxpayer to integrate the loan, the currency swap, and the interest rate swap, and treat the three contracts as a single integrated transaction: a variable-rate loan denominated in U.S. dollars.

According to the preamble of the proposed and final regulations, the IRS has recently become aware of taxpayers that take the position that legging out of only one piece of an integrated transaction does not require recognition of gain or loss on every piece of the integrated transaction. In the example above, such a taxpayer would take the position that, under the legging-out rules, the disposition of the interest rate swap requires the taxpayer to recognize gain or loss on a deemed disposition of the loan, but not on the retained portion of the hedge, that is, the currency swap.

The purpose of the proposed and final regulations is to make clear that if any component of an integrated transaction is disposed of, all of the remaining components shall be treated as sold for their fair market value on the legging-out date.

Tax Court: TurboTax Not to Blame for Underreporting of Income

On September 4, 2012, the Tax Court filed a memorandum opinion rejecting a taxpayer’s attempt to blame TurboTax for misreporting the taxpayer’s income. In Bartlett v. Commissioner, the taxpayer argued that she made “honest mistakes” and that the underreporting of over $100,000 of income was due to a lack of familiarity with TurboTax, believing that the audit feature of the software would catch

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Bartlett v. Commissioner

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any mistake she might otherwise make. Tax Court Judge Julian Jacobs bluntly dismissed the argument: “TurboTax is only as good as the information entered into its software program . . . Simply put: garbage in, garbage out.” Judge Jacobs also found that the errors “were not isolated computational or transcription errors,” and therefore, the deficiency assessment and accuracy-related penalty were appropriate.

More Uncertainty Regarding Medicare Tax

The new 3.8 percent “Medicare tax” will take effect for tax years beginning after December 31, 2012. Section 1411 imposes the tax on individuals and estates and trusts; however Section 1411(e) excludes nonresident aliens as well as trusts in which all unexpired interests are devoted to charitable purposes. To for estates and trusts, the 3.8 percent tax is imposed on the lesser of (i) undistributed net investment income for the taxable year, or (ii) the (if any) of the adjusted gross income less the dollar amount at which the highest tax bracket under Section 1(e) applies (currently $7,500).

In general, a taxpayer’s net investment income includes income from interest, dividends, royalties, rents, and passive activity income from a trade or business. Unfortunately, Congress did not exempt foreign estates and trusts when it exempted nonresident aliens from the tax. Accordingly, as currently drafted, the tax would be imposed on foreign estates or trusts. We assume this will cause some consternation once the tax's effective date arrives, however, right now the only place that concern is evident is in tax disclosure in some securities offerings.

MoFo in the News

On July 18, 2012, MoFo, along with Grant Thornton LLP, hosted a seminar titled “JOBS Act, Theory and Practice.” Led by MoFo partners David Lynn and Anna Pinedo, along with David Weild of Grant Thornton, the seminar addressed the many issues raised by the Jumpstart Our Business Startups Act (JOBS Act). The panel also discussed how the JOBS Act is being implemented by the SEC, issuers, investment banks, and practitioners.

MoFo partner David Kaufman spoke on a panel at the Hedge Funds and Alternative Investments Conference on July 19, 2012. The panel focused on regulatory reform updates and discussed the evolving regulatory and registration environment, reporting requirements, and strategies for passing SEC examinations.

On July 24, 2012, MoFo partner Charles Horn spoke on a Protiviti webinar titled “The Terrible Two’s: Dodd-Frank’s Second Anniversary.” The webinar discussed the Dodd-Frank rule-making progress and provided a view into key upcoming decisions that will further impact financial services organizations.

MoFo partner Dwight Smith led a Bloomberg LP seminar on “Managing Risk: Can Dodd-Frank Prudential Regulations Prevent Another Crisis,” on July 26, 2012. This seminar provided an overview of Dodd-Frank’s compliance requirements including capital and liquidity requirements, reporting, and examinations leading to potential operational changes.

On July 31, 2012, MoFo partners Jay Baris, David Kaufman, Kenneth Kohler, Anna Pinedo, and Dwight Smith participated in an IFLR webinar titled “The Dodd-Frank Act’s Second Anniversary.” This seminar provided a status update at the second anniversary milestone on Dodd-Frank rule-making progress. Panelists focused on concerns for foreign banks, funds and advisers and addressed several major areas, including developments affecting funds and their advisers, prudential supervision, SIFI designation, Orderly Liquidation Authority and resolution planning, ratings and securitization, and derivatives.

MoFo partner Dwight Smith also led a Financial Executives Networking Group webinar on August 1, 2012, on “How Much Capital Is ‘Enough’? Understanding the New Regulatory Capital Needs of U.S. Financial Institutions.” This seminar discussed the impact of these proposed regulations on sources and uses of funds on both financial and nonfinancial institutions; overview of new capital requirements: core elements, minimum requirements, and transition periods; components of common equity, additional Tier 1 and Tier 2 Capital; regulatory capital adjustments and deductions; elements and consequences of the standardized approach risk weights; and differences between the proposed rules and Basel III and CRD IV.

MoFo partner Anna Pinedo joined the Mortgage Bankers Association webinar, "How to Evaluate Private Capital—Alternatives to Securitization” on August 2, 2012. This webinar discussed opportunities for private capital entering the mortgage market, the mortgage REIT market, considerations for structuring certain activities within a mortgage REIT, mortgage servicing assets, nonbank participation in the mortgage market, and the covered bond market.

MoFo partner Anna Pinedo also participated in the ALI-ABA Webcast/Webinar “Swap Definitions, Mixed Swaps, and Books and Records Requirements: New Joint Rules from the CFTC and the SEC” on August 24, 2012. The seminar addressed how the Dodd-Frank Act was passed to, among other things, create new incentives to execute trades of derivatives on transparent platforms—and to settle transactions through centralized clearing. The seminar discussed how the CFTC and the SEC, in consultation with the Federal Reserve Board of Governors and in accordance with directives from Dodd-Frank, have issued joint rules that define “swap” products and offer further guidance regarding “mixed swaps” and governing

(Continued on Page 7)
books and records with respect to “security-based swap agreements.”

On August 28, 2012, MoFo partners Anna Pinedo and Kenneth Kohler led a MoFo telephone briefing titled “Proposed Bank Capital Rules and the Mortgage Market.” This telephone briefing discussed the effects of the proposed bank capital rules on the U.S. mortgage market. Discussion focused on the aspects of the proposals affecting residential mortgages, mortgage servicing rights, and securitization exposures.

The MoFo Tax Department was a sponsor of the Circle of Hope Gala held Wednesday, September 19 at The Beverly Hills Hotel. The Gala supports One Mind for Research (www.1mind4research.org), a charity dedicated to research, funding, marketing, and public awareness of mental illness and brain injury, by bringing together the governmental, corporate, scientific, and philanthropic communities in a concerted effort to drastically reduce the social and economic effects of mental illness and brain injury within ten years.

MoFo tax partners Patrick McCabe and Tom Humphreys attended the event which was MC’d by Tom Hanks.

Upcoming Events

MoFo partner Anna Pinedo will speak at the GARP Master Class program on October 24, 2012. This program will include a comprehensive overview of major regulatory proposals such as Basel II.5, Basel III, the Dodd-Frank Act, CRD IV, EMIR, U.S. implementation of Basel III, derivatives trading, counterparty credit risk, competitive changes in the capital markets and the securitization markets. Anna Pinedo will deliver the session titled “How Has the Dodd-Frank Act Framed the U.S. Response to the Crisis?”

On November 2, 2012, MoFo partner Anna Pinedo will speak at the Cornell Law School Symposium on Law, Innovation and Entrepreneurship. This symposium will focus on federal and state legal and regulatory issues that affect entrepreneurship and new business, including changes in how new businesses are formed and governed, proposed reforms affecting intellectual property rights, and recent (and pending) developments in the federal securities laws. Authors at the symposium will present their papers, and comments from a designated commentator will follow.

MoFo partner David Lynn will moderate a discussion at the PLI 44th Annual Institute on Securities Regulation taking place November 7-9, 2012. The panel, titled “Jumpstarting Capital Formation—The New Legislation and Other Developments,” will discuss the practical impacts of the JOBS Act, measures to foster capital formation while maintaining investor protection, changes in the communications environment after the JOBS Act, dealing with nonpublic public companies, increased pressure for resale liquidity, and the impact of market structure changes on capital raising.

MoFo partners Anna Pinedo and Remmelt Reigersman will conduct a seminar titled “MoFo Classics: Debt Repurchases & Exchanges” on November 8, 2012. With many debt securities trading at discounted levels, this session will discuss the structuring, documentation, securities law, and tax consequences associated with debt repurchases, tenders, and exchanges.

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 nine straight years, and Fortune named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

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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.
Editor’s Note

As tax lawyers we were interested to see the decision by the U.S. Supreme Court in National Federation of Independent Business v. Sebelius holding that the IRC Section 5000A(1)(b) “shared responsibility payment” provided for individuals that do not obtain health insurance beginning in 2014 is a tax. However, lost in the commotion was the fact that upholding the Affordable Care Act also means that as of January 1, 2013 the U.S. will have a new 3.8% tax on investment income including capital gains. Coupled with expiration of the Bush era tax cuts, this will mean a significant increase in federal taxes on investment income. The chart below shows the maximum federal income tax rate, assuming no changes to current law, that applies to an individual earning in excess of the threshold amount with respect to three categories of investment income for the years 2012 and 2013 (both taking and not taking into account the Medicare contribution tax starting in 2013).

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>2013 (without Medicare)</th>
<th>2013 (with Medicare)</th>
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<tbody>
<tr>
<td>Dividends</td>
<td>15%</td>
<td>39.6%</td>
<td>43.4%</td>
</tr>
<tr>
<td>Interest</td>
<td>35%</td>
<td>39.6%</td>
<td>43.4%</td>
</tr>
<tr>
<td>Long-Term Capital Gain</td>
<td>15%</td>
<td>20%</td>
<td>23.8%</td>
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Apart from the historic National Federation decision, Q2 had a bit of everything. The Internal Revenue Service (“IRS”) and the Treasury Department (“Treasury”) announced a third approach to FATCA implementation that is a hybrid between the FFI Agreement and the intergovernmental approach announced in February,1 and released a draft version of Form W-8 to account for FATCA withholding. The Tax Court issued two rulings addressing the characterization of debt and equity in Hewlett-Packard Co. v. Commissioner and NA General Partnership v. Commissioner. Additionally, Federal banking agencies released proposed changes to the U.S. regulatory capital framework, to which many financial institutions reacted rather quickly by redeeming outstanding trust preferred securities. To conclude this edition, we have our regular features, Press Corner and MoFo in the News.

IRS Advisory Memo Finds Parent Cannot Claim Subsidiary’s Stock is Worthless While Tax Refund is Pending

In May 2012, the IRS released an advisory memo addressing whether the parent of a consolidated group can claim a deduction for a subsidiary’s worthless stock when the subsidiary continues to hold tax refund claims. In the memo, the taxpayer (“Taxpayer”) is the common parent of a consolidated group that included an insolvent subsidiary. During the taxable year, Taxpayer’s consolidated group incurred a large consolidated net operating loss (“NOL”), all of which was attributable to the subsidiary. By the end of the tax year, the subsidiary ceased its business operations, disposed of its operating assets, and used the proceeds to pay some of its creditors. The subsidiary continued to hold some assets, including legal claims against its directors and officers, as well as the right to a share of the tax refund attributable to the carryback of the NOL. The retained assets were worth less than the amount of the subsidiary’s unpaid liabilities. At first blush, the stock of the subsidiary held by the Taxpayer was worthless under Section 165(g), which allows holders of worthless stock to treat the stock as disposed of in a sale or exchange in the year in which the stock becomes worthless. Special rules apply, however, to the stock of a subsidiary in a consolidated group. According to Treasury regulations under Section 1502, stock is not considered worthless for Section 165 purposes until all of the subsidiary’s assets are treated as disposed of.

According to the advisory memo, the subsidiary’s share of the refund claim, as well as its legal claims, constitute property, and therefore the subsidiary has not disposed of all of its assets. As a result, the subsidiary’s stock did not meet the standard for worthlessness set forth in the regulations. The advisory memo notes that until 2008, it was only necessary for a subsidiary to have disposed of “substantially all” of its assets in order to meet the standard for worthlessness. In making this requirement stricter by requiring the disposition of all property (except for its corporate charter or any assets necessary to satisfy state law minimum capital requirements), the regulations sought to “prevent gain or loss on stock from being taken into account by the group until after items flowing from the subsidiary’s activities are taken into account by the group.” This decision appears to reflect a preference for viewing consolidated groups as a single entity, rather than as an aggregation of entities.

Tax Court Recharacterizes Preferred Equity as Debt in Hewlett-Packard Case

In Hewlett-Packard Co. v. Commissioner, the Tax Court recharacterized preferred equity owned by Hewlett-Packard Co. ("HP") in a Dutch corporation as indebtedness and denied HP foreign tax credits and a capital loss on the exit transaction.

Background

In 1996, HP bought $202 million of preferred shares in Fopingadreef ("FOP"), an entity incorporated in the Netherlands Antilles. Under the shareholders’ agreement, FOP’s directors were required to declare dividends on the preferred to the extent profits were available to be paid out to HP. Furthermore, HP had the right to put the preferred shares to ABN AMRO Bank N.V. ("ABN"), FOP’s common shareholder, for their fair market value. In the event that ABN defaulted on its obligation to buy the shares from HP, HP had the right to put the shares back to FOP at FMV or force FOP to liquidate.

During the course of HP’s ownership of the preferred shares, FOP paid foreign taxes which entitled HP as the owner of the preferred shares to take into account foreign tax credits. In 2003, HP put the preferred shares to ABN and claimed a $15.5 million loss on the transaction. The IRS challenged HP’s foreign tax credit claim, as well as its exit transaction loss, on three alternative theories: (i) that the stake in FOP was more appropriately characterized as debt, and not equity; (ii) that the investment was a sham under the economic substance doctrine; and (iii) that, under the step transaction doctrine, FOP was a conduit for a loan from HP to ABN. Tax Court Judge Joseph Goekes’s decision that the FOP investment was more akin to a loan than an equity interest mooted the latter two issues.

Tax Court Opinion

The Tax Court applied the Ninth Circuit’s 11-factor test for characterizing debt versus equity. In order to analyze the instrument, the Tax Court first considered whether or not HP’s put option should be integrated with the investment. HP argued that the put option should not be integrated because it

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2 AM 2012-003.
3 The advisory memo does not mention a tax sharing agreement nor does it discuss the reason the subsidiary had claim to part of the refund.
4 All Section references are to the Internal Revenue Code of 1986, as amended (the “Code”) and the Treasury regulations promulgated thereunder.
5 Subsidiary stock is also treated as worthless if the subsidiary for any reason ceases to be a member of the group.
6 Hewlett-Packard Co. v. Commissioner, 424 F.2d 1330 (9th Cir. 1970).
7 A.R. Lantz Co v. United States, 279 F.2d 123, 125-126 (9th Cir. 1960).
HP Case
(Continued from Page 2)

was not binding on FOP, but rather on FOP’s common shareholder, ABN. The Tax Court disregarded this distinction, finding that the put option was part of a package of agreements signed at the FOP closing, that the put option was referenced in the shareholder agreement, and that FOP was inextricably connected to the exercise of the put option.

In applying the 11-factor test to the integrated investment, the Tax Court spent considerable time addressing whether the instrument contained a fixed maturity date and whether HP was afforded creditor’s rights. Although HP argued that the presence of a put option should not be construed as a maturity date, the Tax Court found that all parties expected HP to exit the transaction through the put option in 2003. Additionally, “FOP’s articles of incorporation and various agreements pertaining to FOP afforded HP an apparatus to enforce creditor rights.”

The Tax Court also found that even though HP was nominally entitled to receive dividends from FOP’s earnings, indicating an equity interest, the earnings of FOP were predetermined, “assuring that FOP would have sufficient earnings to make the agreed periodic payments to HP.” As to whether or not HP enjoyed management rights in FOP, the court held that HP did not value those rights, and therefore, the court would “ascribe the same weight to HP’s objectively meaningful voting rights as it did over the term of the transaction.”

Finally, the Tax Court found that although HP was nominally subordinated to all claims of indebtedness against FOP, FOP was prohibited from having material creditors, and therefore, “HP’s rights would never be subordinated to any creditor’s.”

The Tax Court then turned to whether the loss HP incurred upon exiting the transaction should be disallowed. The court suggested that the $15 million decline in value on the investment represented a fee for participation in a tax shelter. Because HP could not carry its burden of showing that this fee should be deductible, the court disallowed the loss on the transaction.

NA General Partnership v. Commissioner
Addresses Debt-Equity Characterization of Related-Party Advances

In NA General Partnership v. Commissioner the Tax Court held that notes issued to a parent by a subsidiary in connection with the acquisition of a target were properly characterized as debt and were not equity for tax purposes.

Background

Beginning in 1998, ScottishPower, a “multi-utility business in the U.K.,” sought to acquire PacifiCorp, an Oregon-based publicly traded utility company. In order to effectuate the merger, ScottishPower used its indirect subsidiary NA General Partnership & Subsidiaries (“NAGP”) to acquire 100% of PacifiCorp. In exchange for their shares, the PacifiCorp stockholders were entitled to receive ScottishPower American Depositary Shares or common shares. NAGP issued loan notes to ScottishPower, $4 billion in fixed-rate notes and $896 million in floating-rate notes.

NAGP failed to make interest payments in 2000, and paid $333 million of the $355 million accrued interest in 2001. NAGP eventually borrowed additional amounts from ScottishPower and from Royal Bank of Scotland in order to maintain its interest payments. In March 2002, ScottishPower made contributions to NAGP, which used the funds to pay the remaining principal and interest on the loans. In total, NAGP claimed $932 million in interest expenses on the loans, which the IRS disallowed, recharacterizing the funds advanced pursuant to the notes as capital contributions by ScottishPower.

Tax Court

Tax Court Judge Diane Kroupa applied the 11-factor test for characterizing debt versus equity used in Hardman v. United States, 827 F.2d 1409 (9th Cir. 1987), and found that the factors weighed more heavily in favor of debt than equity. First, payments on the loans were required to be made regardless of NAGP’s earnings. Furthermore, the notes’ subordination to new debtors was found to be relatively less important in the context of loans made to a related party. Finally, the court gave weight to evidence that the parties subjectively intended to enter into a debtor-creditor relationship. Wrote Kroupa, “we recognize that there are features in this case pointing to both debt and equity. Nevertheless, in view of the record as a whole, we find that the advance was more akin to debt than equity.”

IRS Rules that Money Market Fund Shares are “Cash” for REIT Asset Test Purposes

On June 18, 2012, the IRS issued Revenue Ruling 2012-17, which addressed whether shares in a money market fund are categorized as “cash and cash items” for purposes of the 75 percent value test of Section 856. According to the ruling, money market shares qualify as “cash and cash items” for REIT purposes.

There is no definition of “cash and cash items” contained in Section 856. Noting that Section 856(c)(5)(F) provides that any term not defined in Section 856 shall have the same meaning as when used in the Investment Company Act of 1940 ("the 1940
REIT Asset Test Ruling
(Continued from Page 3)

Act”), the IRS analyzed whether money market fund shares were defined within the meaning of the 1940 Act.

Although the term “cash item” is not defined in the 1940 Act or the regulations promulgated thereunder, the IRS noted that there was a No-Action Letter issued by the SEC’s Division of Investment Management that was directly on point. In the No-Action Letter, the issue was whether money market fund shares were “cash items” or investments for purposes of determining whether the issuer of the shares was an investment company within the meaning of the 1940 Act. The No-Action Letter held that money market fund shares may be treated as “cash items,” finding that the “essential qualities” of cash items are “high degree of liquidity and relative safety of principal” and that money market fund shares possess these same qualities.

The IRS noted that this analysis is not inconsistent with Section 856 or its legislative history and concluded that money market fund shares may be treated as cash items for REIT asset test purposes. The ruling concludes by pointing readers to Revenue Procedure 89-14, which cautions against relying on a revenue ruling that is based on an interpretation of nontax law without first checking to see whether the relevant nontax law has changed materially.

Redemption of Trust Preferreds Following New Federal Reserve Capital Rules
On June 7, 2012, the Federal banking agencies (the OCC, Federal Reserve Board and FDIC) (the “Agencies”) formally proposed for comment, in three separate but related proposals, significant changes to the U.S. regulatory capital framework: the Basel III Proposal, which applies the Basel III capital framework to almost all U.S. banking organizations; the Standardized Approach Proposal, which applies certain elements of the Basel II standardized approach for credit risk weightings to almost all U.S. banking organizations; and the Advanced Approaches Proposal, which applies changes made to Basel II and Basel III in the past few years to large U.S. banking organizations subject to the advanced Basel II capital framework.9 The publication of these proposals constitutes, for most issuers, a Tier 1 capital event under the terms of their outstanding trust preferred securities, and as a result permits them to call their trust preferreds.

Basel III Proposal
This proposal is applicable to all U.S. banks that are subject to minimum capital requirements, including Federal and state savings banks, as well as to bank and savings and loan holding companies other than “small bank holding companies” (generally bank holding companies with consolidated assets of less than $500 million). There will be separate phase-in/phase-out periods for minimum capital ratios; regulatory capital adjustments and deductions; non-qualifying capital instruments; capital conservation and countercyclical capital buffers; supplemental leverage ratio for advanced approaches banks; and changes to the Agencies Prompt Corrective Actions (“PCA”) rules. Almost all of these changes would be effective by January 1, 2019.

Common Equity Tier 1 Capital would be the sum of outstanding common equity Tier 1 capital instruments and related surplus (net of treasury stock), retained earnings, accumulated other comprehensive income, and common equity Tier 1 minority interest, minus certain adjustments and deductions. Unrealized gains and losses on all available-for-sale securities held by the banking organization would flow through to common equity Tier 1 capital. Qualifying common equity Tier 1 capital would have to satisfy 13 criteria that are generally designed to assure that the capital is perpetual and is unconditionally available to absorb first losses on a going-concern basis, especially in times of financial stress.

Standardized Approach Proposal
This proposal would be generally applicable to the same banks that would be subject to the Basel III Proposal. The proposed effective date is January 1, 2015, but banks have the option to adopt rules earlier. The proposal revises a large number, although not quite all, of the risk weights (or their methodologies) for bank assets. For nearly every class, the proposal requires a more complex, detailed and calibrated assessment of credit risk and calculation of risk weightings.

Advanced Approaches Proposal
This proposal applies to banking organizations that are subject to the “advanced approaches” rule under Basel II, including qualifying Federal and state savings associations and their holding companies. It addresses counterparty credit risk, removal of credit rating references, securitization exposures, and conforming technical changes. It also proposes the expansion of those banking organizations that are subject to the market risk capital rule.

Effect on Tax Deductible Bank Equity
As anticipated, the NPR would make the issuance of tax deductible bank equity much more difficult. For example, in the proposal, the banking agencies go beyond Basel III and note that instruments that are debt for GAAP purposes would not qualify as Tier 1 equity. The banking agencies have requested comment on this, and we anticipate that commenters may note that the more stringent U.S. requirement will put depository institutions in the United States at something of a competitive disadvantage.

The NPR, however, does leave some
New Federal Reserve Capital Rules

(Continued from Page 4)

room for “REIT preferred.” In a REIT preferred transaction, the bank sets up a subsidiary that elects to be taxed as a real estate investment trust (“REIT”) for federal income tax purposes. The bank contributes cash or assets in exchange for the REIT’s common stock. The REIT issues non-cumulative perpetual preferred stock to investors. The terms of the REIT preferred provide that it will convert to bank stock upon the occurrence of certain regulatory events. The REIT uses the proceeds from the sale of the preferred and common stock to acquire qualifying REIT assets, e.g., mortgage loans either from the bank or in the market. Income on the assets is used to pay distributions on the REIT preferred with the remaining income being paid as dividends on the common stock. Because the REIT is a pass-through for federal income tax purposes, the transaction achieves the equivalent of a deduction for federal income tax purposes, that is, income on the REIT’s assets to the extent distributed on the REIT preferred is not subject to a corporate level tax. From a bank regulatory standpoint, the REIT preferred is treated as Tier 1 capital, e.g., equity in a subsidiary. Such transactions have been undertaken since the mid-1990s by banks including Chase Manhattan Bank. More recently, in 2006 Washington Mutual Bank issued a REIT preferred that converted into Washington Mutual, Inc. stock when Washington Mutual, Inc. went bankrupt in 2008.

The NPR requires that the REIT be an “operating company.” It is not entirely clear what this means, however, it potentially means that the REIT must be in a profit-making business facing customers. Moreover, the NPR advises that the REIT structure must contemplate suspension of dividends on the REIT preferred. The concern here is that the REIT preferred is effectively cumulative because the REIT must pay dividends to avoid an entity level tax. The NPR, however, provides that a consent dividend procedure, where the common shareholder (e.g., the bank) consents to include the REIT’s taxable income in its income even though no dividend is paid on the REIT preferred or the REIT common could be sufficient. Moreover, REIT preferred is subject to the limits on minority interest set forth in the NPR. The utility of REIT preferred may be limited by the cap on minority interests, also set out in the NPR.

Redemption of Trust Preferreds

In connection with the proposed regulations and the related Tier 1 capital event, financial institutions are redeeming outstanding trust preferred securities due to the loss of Tier 1 capital status. For example, on June 11, 2012, JPMorgan Chase & Co. announced that certain of its trusts will redeem all of the issued and outstanding trust preferred capital securities.

Draft Form W-8 Released for FATCA Implementation

The IRS has released draft versions of revised Forms W-8 that allow foreign financial institutions (“FFIs”) to certify the status of beneficial accountholders that might otherwise be subject to withholding under FATCA. The Forms W-8BEN, “Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding (Individual),” and W-8BEN-E, “Certificate of Status of Beneficial Owner for United States Tax Withholding (Entities),” are available on the IRS website. The draft Form W-8 for entities adds new sections for the financial payee that submits the form to identify its status under FATCA.

IRS Issues Guidance on When COD Income Is “Qualifying Income” For Purposes of the Publicly Traded Partnership Provisions

On June 15, 2012, the IRS issued guidance on when cancellation-of-indebtedness (“COD”) income is treated as “qualifying income” for purposes of determining whether publicly traded partnerships (“PTP”) must be treated as corporations under Section 7704. According to Rev. Proc. 2012-28, the IRS will not challenge a PTP’s determination that COD income is qualifying income under section 7704(d) as long as the taxpayer shows, by any reasonable method, that the debt was incurred in direct connection with activities generating qualifying income (“qualifying activities”). One reasonable method by which the taxpayer can show that debt was incurred in direct connection with activities generating qualifying income is by tracing

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10 In the Standardized Approach (SA) release the reference to operating company states: “Under the proposal, an operating company would not fall under the definition of a traditional securitization (even if substantially all of its assets are financial exposures). For purposes of the proposed definition of a traditional securitization, operating companies generally would refer to companies that are set up to conduct business with clients with the intention of earning a profit in their own right and generally produce goods or provide services beyond the business of investing, reinvesting, holding, or trading in financial assets. Accordingly, an equity investment in an operating company, such as a banking organization, generally would be an equity exposure under the proposal. In addition, investment firms that generally do not produce goods or provide services beyond the business of investing, reinvesting, holding, or trading in financial assets, would not be operating companies for purposes of this proposal and would not qualify for this general exclusion from the definition of traditional securitization.”

COD Income and PTPs

(Continued from Page 5)

the funds to qualifying activities. Ordinarily, however, “a method that allocates COD income based solely on the ratio of qualifying gross income to total gross income will not be considered reasonable.” Taxpayers may request a private letter ruling on whether a method is reasonable.

U.S. Treasury and Japan/Switzerland Announce They Will Negotiate Toward a “Third Way” for FATCA Compliance

As we have previously reported, FATCA is becoming a significant concern to foreign banks, brokers and investment funds because of its potentially far reaching scope. When FATCA’s “withholdable payment” rules take effect in 2014, Sections 1471 through 1474 of the Code will require that an FFI has signed an agreement (“FFI Agreement”) with the IRS in order to avoid a 30% U.S. withholding tax on U.S. source interest, dividends and sales proceeds, as well as on “passthru payments.”

One of the concerns expressed by FFIs is that the exchange of information pursuant to an FFI Agreement violates privacy laws of foreign countries. Because of these concerns, in February the Treasury released a joint statement from the U.S., France, Germany, Italy, Spain, and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA. The joint statement noted that the U.S. is open to adopting an intergovernmental approach to implement FATCA and improve international tax compliance and is willing to reciprocate in collecting and exchanging on an automatic basis information on accounts held in U.S. financial institutions by residents of France, Germany, Italy, Spain, and the United Kingdom (i.e., a country-to-country information sharing model).

Thus, in addition to strict compliance with Sections 1471 through 1474 (e.g., signing an FFI Agreement), the February announcement reflects a second approach designed to achieve FATCA’s goal of increased compliance with U.S. tax law.

On June 21, 2012, Treasury issued joint statements with Switzerland and with Japan that contemplate a third approach for implementation of FATCA. This third approach is a hybrid between the straight FFI Agreement and the intergovernmental approach referred to above, in which FFIs would satisfy their reporting requirements by reporting directly to Treasury, supplemented by exchange of information between the relevant countries upon request while at the same time simplifying the implementation of FATCA.

Swiss Framework

The U.S.-Swiss joint statement explains that the U.S. and Switzerland would enter into an agreement pursuant to which Switzerland:

(i) would direct all non-exempt or non-deemed-compliant Swiss financial institutions to enter into an FFI Agreement with the IRS,

(ii) enable Swiss financial institutions to comply with the obligations set forth in the FFI Agreement by granting an exception to the criminal prohibition on actions for the benefit of a foreign state, and

(iii) provide additional information about U.S. recalcitrant accounts as requested by Treasury pursuant to the exchange of information provisions included in a protocol to the U.S.-Swiss tax treaty.

In exchange, the U.S.:

(i) will expand the categories of deemed-compliant and exempt FFIs for Swiss institutions (e.g., small, local FFIs),

(ii) eliminate U.S. withholding under FATCA on payments to Swiss financial institutions (i.e., by identifying all Swiss financial institutions as participating FFIs or deemed-compliant FFIs, as appropriate), and

(iii) agree to certain other appropriate measures to reduce burdens and simplify the implementation of FATCA.

Additionally, Swiss financial institutions would not be required to:

(i) terminate the account of a recalcitrant accountholder, and

(ii) impose foreign passthru payment withholding on payments to recalcitrant account holders, or to other financial institutions in Switzerland, or in another jurisdiction with which the U.S. has in effect either an agreement for an intergovernmental approach to FATCA implementation, or an agreement for intergovernmental cooperation to facilitate FATCA implementation.

Japanese Framework

Similarly, the joint statement with Japan explains the framework that the relevant U.S. authorities (Treasury and IRS) would enter into with the relevant Japanese authorities (the Ministry of Finance, the National Tax Agency and the Financial Services Agency) under which the Japanese authorities would agree to:

(i) direct and enable financial institutions in Japan, not otherwise exempt or deemed-compliant, to register with the IRS and confirm their intention to comply with official guidance issued by Japanese authorities that is consistent with the obligations of participating FFIs under FATCA, and

(ii) provide additional information about U.S. recalcitrant accounts as requested by Treasury pursuant to the exchange of information provisions

(Continued on Page 7)
Third Approach for FATCA Implementation
(Continued from Page 6)

included in the U.S.-Japan tax treaty. The relevant U.S. authorities would agree to:

(i) eliminate the obligation of each FFI in Japan to enter into a separate FFI agreement, provided that each FFI is registered with the IRS or is excepted from registration,

(ii) identify specific categories of Japanese financial institutions or entities that would be treated as deemed-compliant or exempt due to presenting a low risk of tax evasion (e.g., certain Japanese pension funds), and

(iii) eliminate U.S. withholding under FATCA on payments to financial institutions in Japan that have registered or entered into an FFI agreement with the IRS and conduct due diligence and reporting in a manner consistent with FATCA requirements or are treated as deemed-compliant or exempt pursuant to the agreed upon framework.

Similar to the U.S.-Swiss proposed agreement, financial institutions in Japan that comply with their obligations would not be required to:

(i) terminate the account of a recalcitrant account holder, or

(ii) impose passthru payment withholding on payments to recalcitrant account holders, to FFIs organized in Japan that have registered or entered into an FFI agreement with the IRS, or are otherwise exempt or deemed compliant, or to FFIs in another jurisdiction with which the U.S. has in effect either an agreement for an intergovernmental approach or an agreement for intergovernmental approach.

This third approach announced last week effectively represents a country-by-country modification of the FATCA rules. Under this system all financial institutions in the country would be identified to the IRS and either be exempted or agree to share information about U.S. account holders. (For example, the joint Swiss-U.S. statement mentions “certain small, local FFIs and institutions/schemes in the field of the Swiss pension system” that could be exempted.) In exchange, all such country’s FFIs would be exempt from Section 1471 withholding tax. Also, identification of recalcitrant account holders (e.g., ones who refuse to comply with a request for information) would occur on an aggregate basis under existing treaty obligations rather than FFI-by-FFI. Finally, the participating country’s FFIs would be exempt from the onerous passthru payment rules.

Interestingly, this per country approach is not uniform. Under the Swiss version, Swiss FFIs would enter into FFI Agreements with the IRS. Under the Japanese version, non-exempt Japanese FFIs would register with the IRS and confirm their intention to comply with official guidance issued by Japanese authorities that is consistent with the obligations of participating FFIs.

The joint statements merely announce an intent to negotiate or explore agreements along the foregoing lines. No date is set forth for actual agreements although presumably they would be in force beginning in 2014, when FATCA would otherwise take effect.

For all FATCA updates, including the joint statements, see our FATCA website at KNOWFataca.com.

Press Corner

The New York state legislature has found a way to replace a tax break for in-state craft beer brewers. The new legislation replaces a per-gallon tax exemption, which was struck in a lawsuit brought by a Massachusetts brewer, with an equivalent tax credit. “We believe the governor and lawmakers recognize the contribution our industry is making to reviving the state’s economy and are hopeful they will give us the help we need to continue to add jobs and keep prices down for our loyal customers,” said David Katleski, president of the New York Brewers Association. The new legislation also permits craft beer to be sold at farmers’ markets.12

Circular 230 could be getting a makeover. Treasury Acting Assistant Secretary for Tax Policy Emily McMahon at a luncheon sponsored by the District of Columbia Bar Association said that new rules are expected this summer. “I think it’s fair to say that the covered opinion rules have not really been working as they were intended. The standards have been pretty difficult to apply and have led to a proliferation of circular 230 disclaimers on all sorts of documents including emails.”13

The British government is paying the price for trying to put its hands on other people’s hot pies. The announcement of a new value-added tax on pasties, savory pies filled with meet and vegetables, led to protests against the coalition government, causing the government to change course and drop the pasty tax. The tax was meant to bring pasties in line with other takeout foods, which are subject to sales tax.14

The early bird gets the tax bill? In 2002, officials in Indianapolis decided to forgive the tax burden of property owners opting to finance a new sewer system through installment payments over a number of years. The only problem? Some property owners opted to pay the tax up front in a lump sum, and the city chose not to refund the money. The Supreme Court upheld the city’s course of action against equal-protection complaints, applying a highly deferential standard. The 6-3 majority noted that the burden of a refund system provided the city with a rational basis for making its decision.15

15 See “Roberts is Outraged at a Tax; Thomas Isn’t,” by Brent Kendall, The Wall Street Journal, June 4, 2012.
MoFo in the News

On April 11, 2012, MoFo held a Tokyo teleconference titled “Understanding the New U.S. Derivative Trading Rules.” The teleconference provided a status report on the progress of rulemaking under the Dodd-Frank Act and discussed which rules have been finalized, which rules remain to be finalized, the timeline for remaining rule making, implementation and what to do now if you are a dealer.

Also on April 11, 2012, MoFo partner David Lynn participated in the PLI One Hour Briefing, “The JOBS Act: A Dialogue with Senior Staff from the SEC Division of Corporation Finance and Private Practitioners,” where senior staff members from the Securities and Exchange Commission’s Division of Corporation Finance and two leading practitioners discussed some of the key provisions of the JOBS Act and provided practical advice.

MoFo partners David Lynn and Anna Pinedo joined the JOBS Act Teleconference panel on April 12, 2012, titled “Get a Jumpstart with Practice Pointers – Registered Offerings after the JOBS Act.” Panelists focused on the practical implications for issuers already in registration, for issuers contemplating an IPO, and for underwriters and other advisers working with emerging growth companies.

David Lynn and Anna Pinedo also joined the JOBS Act Teleconference panel on “Get a Jumpstart with Practice Pointers – Private Offerings after the JOBS Act and Section 3(b) Exempt Offerings” on April 13, 2012. Panelists addressed guidance for private offerings during the interim period prior to SEC rulemaking, and also covered the following: lifting of the General Solicitation/General Advertising Ban on Rule 506 Offerings, analogous changes to Rule 144A, practical documentation implications for private placements and Rule 144A offerings, new 3(b)(2) Exemption Details/Comparison to Reg A, 3(b)(2) offerings as a precursor to an IPO or an alternative to a Rule 144A equity offering, preemption, and role of an investment bank in a 3(b)(2) offering. On April 16, 2012, David Lynn and Anna Pinedo joined the PLI Private Placements and Other Financing Alternatives 2012 where PLI faculty analyzed current developments in private placements and hybrid financing transactions, including proposed changes to Regulation A and other changes to the private offering regime, Private Investments in Public Equity (PIPs), registered direct offerings, wall-crossed offerings, and change-of-control transactions. They discussed the basics of private placements and other exempt offerings, as well as recent regulatory reform related and SEC developments involving exempt offerings. They also discussed recent changes to Regulation D effected by the Dodd-Frank Act, taught about Regulation A, staying private, Rule 701, Rule 144 and tacking issues, Section 4 (1-1/2) transactions, block trades, and financings in close proximity to one another.

David Kaufman participated in the April 17, 2012 Swap Dealer Registration and Compliance Working Session seminar to review the process for swap dealer registration, with a focus on the compliance policies and procedures that will be required in connection with registration. The seminar discussed business conduct standards, anti-manipulation and other related matters.

Bruce Mann and Anna Pinedo participated in a panel titled “Teleconference: How will the JOBS Act Affect Non-U.S. Issuers?” on April 17, 2012. Panelists focused on the practical implications for Israeli companies, whether or not they qualify as “foreign private issuers” contemplating an IPO, as well as for Israel-based issuers that may want to conduct a private placement or Rule 144A offering and target U.S. investors.

On April 24, 2012, MoFo partners Peter Green, Jeremy Jennings-Mares and Lloyd Harmetz spoke on the West Legalworks Webinar titled “Structured Products: Update Recent US and EU Regulatory Developments.” This program provided an update as to recent developments impacting structured product development and sales in the US and Europe, based on recent regulatory initiatives from the SEC, FINRA, European Commission, ESMA and the FSA.

Well-known investment banker William Hambrecht and MoFo partners David Lynn and Anna Pinedo joined an April 24, 2012 webinar titled “Deallflow Media Webinar: Jumpstarting the Markets – How the JOBS Act will Affect Capital Raising for Emerging Companies” that taught how the JOBS Act will affect all aspects of capital raising for emerging companies.

MoFo partners David Lynn and Anna Pinedo joined the PLI Global Capital Markets & the U.S. Securities Laws 2012 program on “Raising Capital in an Evolving Regulatory Environment” on April 25, 2012. This program is designed to keep 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.

MoFo partners Anna Pinedo and Hillel Cohn participated in the FMA’s 2012 Securities Compliance Seminar on Cross-Border Concerns: Inbound and Outbound on April 25, 2012. The Seminar’s goal is to help participants acquire an understanding (as well as tools for dealing with) the challenges and regulatory “hot button” priorities currently facing compliance professionals, risk managers and internal auditors in the bank-affiliated broker-dealer industry. The focus was on current compliance topics, new rules or interpretations and regulatory developments, including a Dodd-Frank regulatory reform update. Attendees were given the opportunity to sharpen their skills through general workshop and interactive sessions with their peers, industry leaders and regulators.

The IFLR European Capital Markets Forum, on April 25-26, 2012, brought together high profile speakers from banks, funds, regulators and law firms, including (Continued on Page 9)
MoFo in the News
(Continued from Page 8)

MoFo partner Dwight Smith, to discuss and inform on these essential topics.

MoFo partner Anna Pinedo spoke on the Alternatives to Traditional Securitization Channels Panel during the May 6-9, 2012 Mortgage Bankers Association: National Secondary Market Conference and Expo. This session specifically focused on alternative securitization channels including REITs, covered bonds and life insurance companies in the marketplace. Issues discussed included the Dodd-Frank Act, SEC Concept Release, risk retention and more. Attendees had an opportunity to discuss several aspects of risk management and policy directions as they pertain to today’s business climate.

Jerry Marlatt spoke at the May 10, 2012 ICMA Covered Bond Investor Conference. Speakers and panelists representing regulators, issuers, intermediaries and other interested parties were invited to participate on the basis of what they can contribute to the debate and independent of any sponsorship.

Investment banker William Hambrecht and MoFo partners Anna Pinedo and James Tanenbaum spoke on a May 10, 2012 panel titled “Smaller Public Offerings: Stepping Stone to IPO, or IPO Alternative?” The Jumpstart Our Business Startups (JOBS) Act was passed by the U.S. Congress and signed into law by President Obama. The JOBS Act represents the most significant change to our capital formation regulatory framework since Securities Offering Reform in 2005 and permits non-reporting companies to conduct “mini” public offerings, or Regulation A/3(b)(2) exempt offerings. The panelists discussed this capital raising alternative.

On May 16, 2012, MoFo partners John Delaney, David Lynn and Anna Pinedo joined a panel titled “Teleconference: Crowdfunding Offerings.” Panelists focused on the crowdfunding provisions included in the JOBS Act, and the practical implications for issuers that may wish to consider crowdfunding, and the considerations for intermediaries that may advise in connection with crowdfunding offerings.

A speaker panel from Protiviti and Morrison & Foerster on May 22, 2012, titled “Protiviti Webinar: Issues to Consider when Preparing Capital Plans and Stress Testing” provided an overview of the most important regulatory developments related to capital and provides practical insights into what financial institutions should do when preparing for Capital Plans and Stress Testing. MoFo partners Charles Horn and Dwight Smith joined the panel.


MoFo partners David Kaufman and Anna Pinedo participated in a British Bankers’ Association workshop titled “Swap Dealer Registration and Compliance Workshop” on May 23, 2012. This breakfast workshop was run by Morrison & Foerster and was a working session to review with foreign banks the final rules establishing the process for registering swap dealers and major swap participants. It also examined the business conduct standards applicable to swap dealers, the compliance policies and procedures required for participants in the derivatives market, recordkeeping and reporting requirements and related developments arising in connection with the Dodd-Frank Act.

MoFo partners David Lynn and Randall Fons joined the May 30, 2012 PLI Program titled “JOBS Act 2012.” This comprehensive program covered important changes and issues raised by the JOBS Act that impact not only securities and corporate lawyers, but emerging growth company executives, litigators and research analysts as well. Meredith B. Cross, Director, Division of Corporation Finance and Robert W. Cook, Director, Division of Trading and Markets with the Securities and Exchange Commission, participated as well.

MoFo partner Remmelt Reigersman joined a June 14, 2012 panel titled “Practical Issues in Implementing Section 871(m)” at the 27th Annual Spring Tax Day presented by the Committee of Banking Institutions on Taxation.

Fordham Law School and Morrison & Foerster will host a seminar on July 17, 2012 to discuss recent developments in U.S. Law. Panels will include: Overview of the Dodd Frank Act and Dodd Frank Status Report, Understanding the Territorial Impact of the Volcker Rule, The Interrelationship of Basel III and the Dodd Frank Act, Capital Raising Alternatives for Foreign Issuers According to the U.S. Market.
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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, Fortune 100, technology and life science companies. We’ve been included on The American Lawyer’s A-List for nine straight years, and Fortune named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

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Corporate + Securities Law

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Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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