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Staff of the Chief Accountant's Office of the Division of Investment Management of the SEC Expresses Views on Section 19 in Dear CFO Letter

The staff (the Staff) of the Chief Accountant's Office of the Division of Investment Management (the Division) of the U.S. Securities and Exchange Commission (SEC) released a letter (https://www.sec.gov/files/industry-comment-letter-112219.pdf) directed to the Chief Financial Officer of the Division's registrants and other relevant parties (Dear CFO Letter), to assist investment company registrants in addressing certain accounting, auditing, financial reporting, or other related disclosure matters. The Dear CFO Letter includes information on Staff positions regarding Section 19(a) of the Investment Company Act of 1940 (the 1940 Act). Section 19(a) of the 1940 Act prohibits a fund from making a distribution from any source other than the fund's net income unless the payment is accompanied by a written statement which adequately discloses the source of any payment or dividend distribution wholly or partly from a source other than accumulated undistributed net income, determined in accordance with good accounting practice, or net income determined for the current or preceding fiscal year. An accounting matters bibliography (https://www.sec.gov/investment/accounting-matters-bibliography) listing current Staff positions expressed in Dear CFO Letters states that the Staff believes that "good accounting practice" means financial information prepared in accordance with U.S. generally accepted accounting principles. However, the Staff states that it would not object if the tax basis of such financial information is utilized instead, so long as the basis for calculating such sources is used consistently. The Staff also expresses the view that income tax forms provided to investment company investors, including Internal Revenue Service Form 1099-DIV, are not appropriate vehicles to comply with the communication requirements of Section 19(a) of the 1940 Act because they are not made contemporaneously with each distribution.

IRS Modifies FBAR Filing Verification Process

The IRS has changed the process (https://www.stradley.com/-/media/files/publications/2019/12/sbse0411190057.pdf?la=en&hash=975E4483038F8BFA9DF20992A13398F0) under which it accepts requests for verification that it has received a filed FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). Effective Nov. 19, the IRS will no longer accept verbal requests for verification of FBAR filings. All requests for verification of an FBAR filing must be submitted in writing. Consequently, the existing fee structure in IRM 4.26.16.4.13(4)(b) will apply to all verification requests. For written requests for FBAR filing verification, there is a $5.00 fee for verifying the filing status of five or fewer FBARs and a $1.00 fee for each additional FBAR filing verification requested. If the requester needs copies of the filed FBARs, there is an additional fee of $0.15 per copy of the entire FBAR. (See IRM 4.26.16.4.13(4)(b).) In response to written requests, the IRS will send a letter stating whether the record shows that an FBAR was filed and, if so, the date filed. If a copy of a paper-filed FBAR is requested, a copy will be included with the IRS's letter. The process ensures that the IRS has documentary evidence of all FBAR filing verification requests and its responses to those requests.

IRS Releases Final and Proposed BEAT Regulations

The IRS released final regulations (T.D. 9885) (https://www.federalregister.gov/documents/2019/12/06/2019-25744/base-erosion-and-anti-abuse-tax) implementing the base erosion and anti-abuse tax (BEAT) and providing reporting requirements related to

the BEAT. The final regulations retain the basic structure and approach of the proposed regulations (see our prior coverage here (https://www.stradley.com/insights/publications/2018/12/tax-insights-december-19-2018)), with certain modifications. Section 59A, as added by the 2017 Tax Cuts and Jobs Act (TCJA), imposes a tax equal to the "base erosion minimum amount" on certain "applicable taxpayers." (Section references are to the Internal Revenue Code of 1986, as amended.) In general, applicable taxpayers are corporations, excluding regulated investment companies (RICs), real estate investment trusts (REITs) and S corporations, that satisfy a "gross receipts test" and a "base erosion percentage test."

The proposed BEAT regulations (REG-112607-19) (https://www.federalregister.gov/documents/2019/12/06/2019-25745/additional-rules-regarding-base-erosion-and-anti-abuse-tax) address the following aspects of the BEAT: (a) how a taxpayer determines its aggregate group for purposes of determining gross receipts and the base erosion percentage, (b) an election to waive deductions, and (c) the application of the BEAT to partnerships. Because an applicable taxpayer is defined under Section 59A(e)(1)(A) as a corporation other than a RIC, a REIT or an S corporation, taxpayers that file the Form 1120 series of tax returns are most likely to be affected by the proposed regulations.

IRS Releases Final and Proposed Foreign Tax Credit Regulations

The IRS issued final regulations (T.D. 9882) (https://www.irs.gov/pub/irs-drop/td-9882.pdf) on the foreign tax credit (FTC), reflecting changes made under the TCJA. The TCJA significantly revised the FTC rules. For example, the TCJA repealed Section 902; added two FTC limitation categories in Section 904(d) to the prior two categories of general and passive income; added Section 951A, which requires a U.S. shareholder of a controlled foreign corporation to include certain amounts in income (the GILTI inclusion); and provided a new dividends-received deduction for dividends from foreign subsidiaries.

The proposed regulations (REG-105495-19) (https://www.irs.gov/pub/irs-drop/reg-105495-19.pdf) provide guidance on the allocation and apportionment of deductions and creditable foreign taxes, the definition of financial services income, foreign tax determinations, the availability of FTCs under the "transition tax," and the application of the FTC limitation to consolidated groups.

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IRS Releases FAQs Regarding Rental Real Estate Not Covered by Section 199A Safe Harbor

The IRS has issued a series of frequently asked questions (FAQs) (https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs#rental) regarding rental real estate that does not fall under a safe harbor that treats certain rental real estate businesses as trades or businesses solely for the purposes of Section 199A, the qualified business income deduction.

Pennsylvania Excludes Canned Banking Software From Sales and Use Tax

Pennsylvania Gov. Tom Wolf signed legislation (L. 2019, H17 (Act 90)) (https://legiscan.com/PA/bill/HB17/2019) providing an exclusion from sales and use tax for canned computer software used in banking. Effective Nov. 27, the sale or use of canned computer software directly utilized by a financial institution in the business of banking is not taxable. For purposes of the exclusion, a "financial institution" is an institution doing business in Pennsylvania that is subject to Bank and Trust Company Shares Tax or Mutual Thrift Institutions Tax. The term "directly utilized in conducting the business of banking" includes a financial institution's purchase of canned computer software to be used in transactions with customers and service providers, but does not include the purchase of canned computer software by entities other than a financial institution itself, such as holding companies and the financial institution's subsidiaries.