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IRS Issues Temporary Regulations Defining Predecessor, Successor and Limiting Gain Recognition Under Section 355(e)

The IRS issued Temporary Regulations (T.D. 9805, https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-30160.pdf) that set out rules under Sections 355(e) and 355(f) (section references are to the Internal Revenue Code of 1986, as amended), which provide exceptions to the general Section 355 rule that spinoffs of controlled corporations are tax-free. The text of the Temporary Regulations also serves as the text of Proposed Regulations.

The Temporary Regulations provide guidance on determining whether a corporation is a predecessor or successor of a distributing corporation or a controlled corporation for purposes of the Section 355(e) exception to the nonrecognition treatment for qualifying distributions under Section 355. Additionally, the Temporary Regulations also provide limitations on the recognition of gain in certain cases involving a "Predecessor of a Distributing" corporation. The Temporary Regulations generally follow the Proposed Regulations issued in 2004, but with numerous modifications.

Specified Bank Instruments Treated as Indebtedness

The IRS issued Revenue Procedure 2017-12, 2017-3 IRB (https://www.irs.gov/pub/irs-drop/rp-17-12.pdf) in which it determined that certain heavily regulated types of debt instruments used by global systemically important banking organizations (GSIBs) will be treated as indebtedness for federal tax purposes.

Despite being debt in form, internal total loss-absorbing capacity (TLAC) issued under regulations issued by the Board of Governors of the Federal Reserve Bank (the "Board") lacks several of the elements that generally are required for an instrument to be treated as indebtedness for federal income tax purposes. Given the role of internal TLAC in the global economy and the degree of oversight to which they are subject, the IRS believes that it is in the interest of sound tax administration to apply federal tax principles in a manner that will support the rules promulgated by the Board for recapitalizing the issuer of internal TLAC on a going-concern basis.

The IRS will treat internal TLAC that is issued by a domestic intermediate holding company (IHC) of a foreign GSIB pursuant to the regulations issued by the Board as indebtedness for federal tax purposes to the extent that the internal TLAC has not been subject to a debt conversion order. An internal debt conversion order means an order by the Board, issued only under certain circumstances, to immediately convert or exchange to common equity tier 1 capital an amount of TLAC specified by the Board in its discretion.

Revenue Procedure 2017-12 is effective for instruments issued on or after Dec. 15.

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IRS Advises Agents to Limit Acceptance of Electronic Signatures

In Chief Counsel Advice 201650019 (https://www.irs.gov/pub/irs-wd/201650019.pdf) the IRS has advised its auditors that an electronic signature should be accepted by the IRS only when there is published guidance or Internal Revenue Manual provisions that specifically authorize the use of an electronic signature for the specific form involved.

IRS Issues Rulings on Investor Control — Treatment of Contract Holders as Owners of Shares

In companion rulings Private Letter Ruling 201651002 (https://www.irs.gov/pub/irs-wd/201651002.pdf) and Private Letter Ruling 201651012 (https://www.irs.gov/pub/irs-wd/201651012.pdf), the IRS ruled that a life insurance company, rather than variable contract holders, is the owner of a portfolio (a fund) and its underlying investment assets for tax purposes where the adviser, rather than holders, had complete control over the portfolio's investments. In each ruling, the portfolio is taxed as a partnership and invested in eligible third-party mutual funds, other third-party variable insurance investment options or both (collectively, Underlying Funds). The portion of a portfolio's assets allocated to an Underlying Fund will change over time, and there is no expectation that current or past positions in an Underlying Fund will be maintained in the future. A variable contract holder will have no current knowledge of a portfolio's specific assets, but the portfolio's holdings will be available as permitted by the SEC, including in quarterly filings with the SEC and in annual and semiannual reports to shareholders. Each portfolio will comply with the diversification requirements of Section 817(h) and Treasury Regulations Section 1.817-5(b).

The IRS found, in each of the Private Letter Rulings, that the variable contract holders do not have any control over a portfolio's investments, including a portfolio's investments in the Underlying Funds. The investment decisions of a portfolio are made by the adviser in its sole and absolute discretion and are subject to change without notice to or approval by the variable contract holders. The IRS found that a portfolio is not an indirect means of allowing a variable contract holder to invest in an Underlying Fund.

FBAR Filing Deadline Pushed Back for Certain Individuals With No Financial Interest in Accounts

In light of proposed regulations issued in March (see our coverage at http://www.stradley.com/insights/publications/2016/tax-insights-2016/tax-insights-march-9-2016) that would expand and clarify exemptions from Report of Foreign Bank and Financial Account (FBAR) reporting for certain individuals with signature authority over, but no financial interest in, one or more foreign financial accounts, the Financial Crimes Enforcement Network (FinCEN) has issued FinCEN Notice 2016-1 (https://www.fincen.gov/sites/default/files/2016-12/FBAR%20Notice%202016%20(FINAL%2012-8-16)_0.pdf) extending the FBAR filing due date to April 15, 2018, for such individuals. The extension is the latest in a series of identical extensions over the past few years, and it applies to the reporting of signature authority held during the 2016 calendar year, as well as to reporting deadlines extended in prior FinCEN notices.

Reminder: Due Date for Forms W-2 and Certain Forms 1099-MISC is Jan. 31

2016 Forms W-2 (Wage and Tax Statement) that report employee compensation and all 2016 Forms 1099-MISC (Miscellaneous Income) that report nonemployee compensation must be filed by Jan. 31, 2017. The new due date is because of changes made pursuant to the Protecting Americans from Tax Hikes Act of 2015, Div. Q (PATH Act, P.L. 114-113, 12/18/2015).