NEW April 2018 Edition of
Mergers, Acquisitions, and Buyouts

by Martin D. Ginsburg, Jack S. Levin, and Donald E. Rocap

We are proud to enclose the April 2018 edition of Ginsburg, Levin, and Rocap's **Mergers, Acquisitions, and Buyouts.**

Here is a summary of major developments reflected in the new edition (including very significant amendments made by the 2017 Tax Act), written by co-authors Jack S. Levin and Donald E. Rocap, senior partners in the international law firm of Kirkland & Ellis LLP.

Highlights of the New Edition

- **Federal income tax rates for 2018 and thereafter.**
  - **C corp income tax rate.** The federal *C corp* income tax rate for 2018 and thereafter (on both OI and LTCG) has been reduced to 21%,
    - while the approximately 3 percentage point reduction on qualified U.S. production business net income has been repealed.
  - **Individual income tax rates.** The top federal *individual* income tax rates for 2018 and thereafter (which also apply to partnership, LLC, and S corp income flowing through to an individual equity owner) are as follows:
    - For **OI**, the top rate has been reduced to 37%,
      - with a possible further reduction of the top rate to 29.7% for "business" OI flowing through a partnership, LLC, or proprietorship to a qualified individual (as further discussed below),
      - while the approximately 3 percentage point reduction on qualified U.S. production business net income has been repealed.

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- For **normal LTCG**, the top rate continues at 20%.
- For **STCG**, the top rate has been reduced to 37%.
- For **QDI** (qualified dividend income), the top rate continues at 20% (i.e., the same as for LTCG).
- For **Code §1202 LTCG** (from sale of "qualified small business stock" held more than 5 years), the top rate continues at:
  - 0% for such stock acquired after 9/27/10,
  - 7% for stock acquired between 2/18/09 and 9/27/10, and
  - 14% for stock acquired between 8/11/93 and 2/17/09.

- **Individual income-based Medicare tax** (in addition to regular income tax):
  - On **compensation and self-employment income**, the rate continues at 3.8%, with (a) 2.9% imposed half on an employer and half on an employee or 100% on a self-employed person plus (b) an additional 0.9% on such income in excess of a threshold amount ($250,000 for a joint-return individual) imposed 100% on an employee or self-employed person.
  - On **passive income (including OI, QDI, and CG) from investments and businesses as to which an individual is not active**, the rate continues at 3.8%, to the extent the individual's AGI exceeds a threshold amount ($250,000 for a joint-return individual).
- **Individual itemized deduction and personal exemption phase-outs which previously affected individual income taxes:**
  - The former **itemized deduction phase-out** by 3% of AGI in excess of a threshold amount (approximately $300,000 for a joint-return individual), with a maximum phase-out equal to 80% of itemized deductions, has been repealed.
  - Personal exemptions (and hence the former phase-out) have been repealed. See discussion at ¶106.3.

- **Reduced individual OI rate for "qualified U.S. business income" from flow-through entity.** Code §199A, enacted by the 2017 Tax Act and effective only for taxable years 2018 through 2025, provides a special deduction equal to up to 20% of an individual's "qualified business income" ("QBI"), thus reducing an individual's federal income tax rate on QBI by up to 20%—from 37% to 29.6%—for an individual otherwise taxed at the maximum federal rate who qualifies for the maximum Code §199A deduction.

Under the statute's convoluted terms, the Code §199A deduction is equal to an individual's "combined qualified business income amount" ("Combined QBI Amount"), which, in turn, is the sum of:

(1) 20% of the individual's QBI from each qualified trade or business carried on by the taxpayer, plus

(2) 20% of the aggregate amount of the individual's qualified REIT dividends and qualified publicly traded partnership income.

However, the individual's "Combined QBI Amount" is capped at 20% of the individual's overall taxable income (excluding CG and QDI taxed at a maximum 20% rate).

Determining whether a QBI deduction is available to an individual and, if so, in what amount, involves a 5-step analysis:

(1) In the applicable taxable year, did the individual (a) recognize trade or business income, either directly through operation of a sole proprietorship or indirectly through owning an equity interest in a partnership, LLC, or S corp, (b) receive dividends from a REIT, or (c) recognize income with respect to an interest in a publicly traded partnership?

(2) Did the trade or business income described in (1)(a) come from one or multiple trades or businesses?

(3) For each applicable trade or business, did the income described in (1)(a) come from a "qualified trade or business" (a "Qualified Business"), which does not include the business of performing services as an employee and, for a higher income individual,[1] does not include a "specified service trade or business"?

(4) For each applicable trade or business, what amount of income described in (1)(a) consisted of "qualified items of income, gain, deduction, and loss," which includes only items (a) effectively connected with a trade or business within the U.S. and (b) not within the carve-outs for certain investment-related amounts or certain amounts representing compensation for services.

(5) For a higher income individual, with respect to each trade or business producing income described in (1)(a), what was the individual's allocable

[1]A higher income individual generally means taxable income (before subtracting the QBI deduction) above $415,000 for a joint return taxpayer or $207,500 for a separate return taxpayer, subject to a post-2018 inflation adjustment.

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share of the W-2 wages and the "unadjusted asset basis" of such trade or business?

- **Qualified Business.** A Qualified Business is "any trade or business" other than (a) the trade or business of performing services as an employee and (b) in the case of a higher income individual, a "specified service trade or business."

  - **Exclusion of specified service business for higher income individual.** For a higher income individual, a Qualified Business does not include a "specified service trade or business," which means "any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business (excluding an engineering and architecture business) where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees or owners or . . . which involves the performance of services that consist of investing or investment management, trading, or dealing in securities, partnership interests, or commodities."

    There will doubtless be disputes over the breadth of the exception for a business where the principal asset is the reputation or skill of 1 or more employees or owners. Does this exception cover any well-run, reputable service business (including, e.g., a landscaping or temporary staffing business) or only one requiring some threshold level of advanced skills on the part of its owners or employees?

    Other disputes will likely arise as to whether a non-specified service activity conducted in conjunction with a larger specified service business can be treated as a separate trade or business, thus escaping the specified service taint. An accounting firm that also generates profits from, e.g., licensing financial software to clients will have a strong incentive to characterize its licensing activities as a separate non-specified service business and thus gain access to the 20% QBI deduction for its software licensing income.

- **Calculating QBI amount.**

  - **Combined QBI amount.** Subject to certain limitations, the QBI deduction is equal to a taxpayer's "combined qualified business income amount." A number of complicated concepts are packed into those five words. The Combined QBI Amount is the sum of amounts determined under two separate prongs:

    - The first prong is 20% of the QBI amount with respect to each of the individual's Qualified Businesses for the taxable year but subject, in the case of a higher income individual, to a W-2 wages/unadjusted asset basis limitation, calculated separately for each Qualified Business.

- The second prong is 20% of "the aggregate amount of the [indvidual's] qualified REIT dividends and qualified publicly traded partnership income" for the taxable year.

To make the first prong calculation, after determining whether an individual has income or deductions from a Qualified Business and whether those items come from one or more than one Qualified Business, it is necessary to determine:

- What items of income, gain, loss, and deduction from each Qualified Business are "qualified" items (taken into account in determining the QBI from such Qualified Business) and

- To what extent the QBI from each Qualified Business (that may be taken into account in calculating the Combined QBI Amount) is reduced by the W-2 wages/unadjusted asset basis limitation for such Qualified Business.

▲ **Qualified items of income and deduction.** All items of income, gain, loss, and deduction recognized by an individual with respect to a Qualified Business are treated as "qualified items," subject to three adjustments.

First, items of income, gain, deduction, and loss are excluded from the QBI calculation if *not* effectively connected with the conduct of a trade or business *within the U.S.* This requires exclusion or apportionment of income and expense items if the Qualified Business is conducted in whole or in part outside the U.S. or if a portion of the activities are determined to be investment activities not effectively connected with a trade or business.

Second, certain categories of investment-flavored items are excluded, including items of CG and CL, dividend income, and investment interest income.

Third, compensation for services provided by the individual are excluded from QBI.

▲ **W-2/unadjusted asset basis limitation for higher income individual.** For a higher income individual, the QBI deduction from each Qualified Business is limited to the greater of:

- 50% of the individual's share of W-2 wages with respect to the Qualified Business or

- the sum of 25% of the individual's share of W-2 wages with respect to the Qualified Business, plus 2.5% of the individual's share of the Qualified Business' "unadjusted basis immediately after acquisition of all qualified property."

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The W-2 wage-based limitation makes the amount of the QBI deduction highly dependent on the form of legal relationship between a Qualified Business and its service providers. There may be good business reasons for a Qualified Business to contract for services from third parties (e.g., to hire individual independent contractors, or a staffing company that employs lower-level personnel, or a management company to manage the overall business) in lieu of directly hiring employees, and there may be good business reasons for a Qualified Business that is a partnership (or LLC) to grant equity interests to many of its employees. But using any of such structures reduces the business' W-2 wage-based limitation and hence could reduce the QBI deduction produced by the Qualified Business.

- ▲ **Qualified property.** Qualified property means tangible depreciable property used in the qualified trade or business for which the "depreciable period" has not ended before the close of the taxable year. For this purpose, the "depreciable period" for an item of qualified property ends on the later of (i) 10 years after the property was first placed in service by the taxpayer and (ii) the end of the last full year in the property's Code §168 depreciation period. The "unadjusted" basis of such property should mean its tax basis before taking into account any depreciation deductions, including the 100% deduction allowed in 2018–22 taxable years.

- ■ **One business or multiple businesses.** Key to the application of Code §199A is the question whether an individual is engaged in a single trade or business or multiple trades or businesses. This question affects several parts of the Code §199A analysis, with the following two being most important:

  - ▲ **First**, for a higher income individual a specified service business is not a Qualified Business. Whether certain activities of an individual constitute a specified service business may hinge on whether the activities are combined with or separated from the individual's other business activities.

  - ▲ **Second**, for a higher income individual the QBI deduction is subject to the W-2/asset basis limitation, which limitation is calculated separately for each Qualified Business. Calculation of this limitation will change depending on whether certain trade or business activities are combined with or separated from other trade or business activities.

  Code §199A provides no guidance regarding how to determine the bounds of a taxpayer's trade or business activity. A similar issue has, however, long existed under the Code §469 passive activity loss rules—which require separate tracking of losses from separate passive business activities—and Reg. §1.469-4(c) states that one or more trade or business activities may be treated as a single

activity if the activities "constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469," sets forth a number of factors relevant in making this determination, and permits a taxpayer to use any reasonable method of applying the relevant facts and circumstances in grouping activities. We believe that taxpayers should be able to rely on these §469 activity-grouping rules pending issuance of §199A-specific guidance.

- **REIT dividends and PTP income.** Under the second prong of the Combined QBI Amount calculation, an individual's Combined QBI Amount includes 20% of the individual's aggregate amount of qualified REIT dividends and qualified publicly traded partnership income.
  - **Qualified REIT dividends.** A qualified REIT dividend is any dividend from a REIT other than a capital gain dividend or QDI (taxed at the maximum 20% LTCG or QDI rate).[2] Surprisingly, the QBI deduction for qualified REIT dividends is *not* limited to the amount of the deduction that would be allowed if the REIT were viewed as a flow-through entity (or if QBI were determined at the REIT entity level).
  - **Qualified PTP income.** Qualified PTP income means the net amount of an individual's allocable share of all §199A "qualified' items of income, gain, deduction, and loss from a PTP, plus any gain upon disposition of a PTP interest that is not treated as CG (e.g., gain attributable to depreciation recapture or appreciated inventory treated as OI under Code §751). Under this definition, PTP income and deductions coming from non-qualified items (e.g., income not effectively connected with a U.S. trade or business and non-business interest income of the PTP) are excluded from the QBI deduction calculation. The W-2/asset basis limitation does not apply to limit the §199A deduction for qualified PTP income. See discussion at ¶106.3.5.

- **Substance-over-form doctrine.** Two circuit courts disagreed with the Tax Court on whether (in transactions involving similar facts) the "substance over form" doctrine could be applied to rearrange transaction steps. As discussed in the prior edition of this treatise, the Sixth Circuit's 2017 *Summa Holdings* decision addressed a fact pattern where the shareholders of a closely held manufacturing corporation (Opco) formed Roth IRAs which, in turn, formed (through an intermediate corporation), a domestic international sales corporation (DISC).

The Code explicitly permitted Opco to pay deductible commissions on export sales to the DISC without requiring the DISC to perform services of equivalent value, and

[2] The REIT rules permit a REIT recognizing LTCG or QDI to pass through that character with respect to a corresponding portion of the dividends it pays.

Opco did just that. The DISC then distributed dividends through the intermediate corporation to the Roth IRAs. Through this structure, substantial funds moved into the shareholders' Roth IRAs without being subject to shareholder-level tax.

IRS argued that the actual cash flows—commission payments by Opco to the DISC, followed by dividends to the intermediate corporation, followed by dividends to the Roth IRAs—should be disregarded and the cash flows recharacterized as dividends paid by Opco to the shareholders, which they then contributed to their Roth IRAs. The Tax Court agreed with IRS's recharacterization, but the Sixth Circuit did not.

The *Summa Holdings* 2017 decision addressed the tax consequences of this transaction *to Opco*. In 2018, the First Circuit addressed *the shareholder-level tax consequences* of the same transaction in *Benenson v. Commissioner*. Like the Sixth Circuit in *Summa Holdings*, the First Circuit in *Benenson* declined to apply substance-over-form principles to recharacterize the transaction. The court described the substance-over-form doctrine "as a tool of statutory interpretation . . . that does not take a transaction entirely outside its statutory framework, but instead helps courts read tax statutes in a way that makes their technical language conform more precisely with Congressional intent." The court noted that Congress had granted tax benefits to both DISCs and Roth IRAs and specifically contemplated that DISCs could be owned by IRAs. Based on these facts, the First Circuit concluded that any tax avoidance resulting from these statutory rules should be addressed by Congress rather than by the courts. The court also pointed out that IRS had failed to challenge the low valuation of the DISC shares in the year the Roth IRAs acquired the shares.

In the 2018 *Mazzei decision* (appealable to the 9th Circuit), the Tax Court returned to a fact pattern similar to *Summa Holdings* (but involving deflection of Opco profits to a foreign sales corporation (FSC), rather than to a DISC). In *Mazzei*, the court determined that the form of the transaction (in particular the Roth IRAs' ownership of the FSC) was inconsistent with its substance, on the grounds that (a) the Roth IRAs paid only a nominal amount to acquire the FSC stock and (b) Opco and its shareholders had complete control over whether any economic value would flow to the FSC. Based on these factual determinations, the court held that the FSC should be treated, in substance, as owned by the shareholders so that dividends formally paid by the FSC to the Roth IRAs should be treated, in substance, as paid to the shareholders and then contributed by the shareholders to the Roth IRAs, resulting in excess IRA contributions subject to excise tax. See discussion in ¶608.3.3.2.

- **Tax-free §368 reorganization—COI.** In order for most types of corporate reorganizations—e.g., P corp's or its subsidiary's acquisition of T corp in exchange for consideration consisting wholly or largely of P stock—to qualify as a Code §368 tax-free reorganization, the transaction must (among other requirements) satisfy the judicial continuity of interest ("COI") doctrine, as codified in IRS regulations.

Under case law and IRS regulations, 25% of aggregate consideration paid in P stock does not furnish sufficient COI and the line for reaching sufficient P stock to satisfy the COI requirement is somewhere between 25% and 40% of aggregate consideration, with 40% clearly sufficient.

For COI measurement purposes, the FV of the aggregate P stock received by T's shareholders as a percentage of aggregate consideration was traditionally measured on the date the P-T acquisition was consummated. However, using the FV of P stock as of the effective time of the reorganization can raise COI issues where (a) the ratio of any cash consideration to the number of P shares was fixed by the acquisition agreement and (b) the P shares' FV fluctuates (i.e., declines) over the period (perhaps lasting several months) from signing to closing.

2005 and 2011 regulations permit the parties to value both P's shares and the other acquisition consideration as of the last business day preceding a binding acquisition agreement calling for fixed consideration (the "signing date rule"), rather than on the closing date, since T's shareholders can be viewed as subject to P's economic fortunes as of the signing date of a binding contract providing for fixed consideration including P shares.

A 1/18 Revenue Procedure has now authorized 3 safe harbor average-value methods that can be used in valuing exchange-traded P stock for purposes of measuring COI where either the signing date rule or the closing date rule applies. Under these safe harbors, a taxpayer may value shares of a class of exchange-traded P stock, based on:

(a) average of daily volume-weighted prices,

(b) average of daily high-low average trading prices, or

(c) average of daily closing prices,

in each case as determined on each day of a specified measuring period which (i) includes at least 5, but not more than 35, consecutive trading days, (ii) ends no later than the transaction's closing date, and (iii) ends no earlier than 3 days before the signing date (if the signing date rule applies) or 3 days before the closing date (if the closing date rule applies).

The revenue procedure allows use of these safe harbor COI valuation methods only if certain conditions are met, including:

(i) shares of P stock to be issued in the transaction are traded on a national securities exchange,

(ii) all parties to the potential reorganization (as defined in Code §368(b), which includes the participating corporate entities but not their shareholders) treat the transaction in a consistent manner,

(iii) the transaction contract specifies the safe harbor valuation method and the measuring period that will be used to value P's exchange-traded shares,

(iv) pursuant to the contract, "the parties will utilize the value of [the exchange-traded P shares] determined under the selected [safe harbor valuation method and measuring period] in determining the number of shares of each class of [P] stock, the amount of money, and any other property . . . to be exchanged for" T stock, and

(v) where COI is determined under the closing date rule, the transaction is effected pursuant to a contract binding on the parties no later than the beginning of the first trading day of the applicable measuring period. See discussion at ¶610.2.3.

- **Code §355 spin-offs.** Because the stakes are often high in securing tax-free Code §355 treatment for a distribution of stock, taxpayers often wish to obtain IRS letter rulings confirming that a proposed transaction meets the statutory requirements. IRS's willingness to provide such rulings has evolved through a number of permutations. Over several decades, IRS's ruling practice steadily narrowed, until in 2013, IRS announced that it would provide §355 rulings only with respect to "significant" issues. Then in 9/17 IRS reversed course and introduced an 18-month pilot program, under which it would in certain circumstances again rule on the general federal income tax consequences of an entire transaction. Under this pilot program, taxpayers may now choose whether to seek a ruling on an entire transaction or to submit a ruling only on significant issues. See discussion at ¶1001.2.

- **NOL carryovers.** Historically, a taxpayer incurring a net operating loss ("NOL") in a taxable year has been permitted to carry the NOL back to specified prior years or forward to specified future years. The years to which NOLs may be carried forward—and more importantly carried back—has fluctuated, as Congress has focused at different times on either (a) giving troubled companies access to additional cash by extending the NOL carryback period or (b) accelerating tax collections by restricting the carryback period.

  In 2017 the pendulum swung in the direction of restricting NOL usage with the 2017 Tax Act providing that NOLs generated in a taxable year beginning after 12/31/17 may not be carried back at all, but may be carried forward for an unlimited period, although post-2017 NOLs that are carried forward cannot offset more than 80% of any carryforward year's taxable income. See discussion at ¶1203.1.

- **Code §163(j) limitation on post-2017 interest deduction where net interest expense exceeds 30% of EBITDA (or post-2021 exceeds 30% of EBIT).** Code §163(j), as amended by the 2017 Tax Act, effective for taxable years beginning after

12/31/17, limits the deductibility of business interest expense.[3] The limitation applies to all forms of taxpayers incurring business interest expense—C corps, S corps, partnerships, and individuals—with exceptions for certain small businesses, electing real property businesses, electing farming businesses, businesses incurring floor plan financing interest, and regulated utilities. Calculation of the limitation is complicated and subject to numerous interpretive issues as applied to business debt incurred by a C corp and even more so as applied to business debt incurred by a partnership or S corp.

- **Application to C corp.** Under §163(j), a C corp's deduction for business interest expense is generally limited to (a) the C corp's business interest income plus (b) 30% of its "adjusted taxable income." Interest that is non-deductible as a result of this limitation is carried forward indefinitely by the C corp, treated as business interest expense incurred in each succeeding taxable year, and subjected to the Code §163(j) limitation in each such succeeding taxable year.

  In the case of an affiliated group of corporations filing a consolidated return, Notice 2018-28 announces that Treasury/IRS intend to issue regulations applying §163(j) on a consolidated group basis.

  A C corp's "adjusted taxable income" for a taxable year is the corp's taxable income for such year computed without regard to several specified items. Most importantly, taxable income is adjusted to: (a) exclude any business interest income, (b) exclude any business interest expense, and (c) for years beginning after 12/31/17 and before 1/1/22 (but not for any subsequent years), exclude any depreciation, amortization, or depletion deductions. But for a C corp, all other types of income and expense are taken into account in calculating adjusted taxable income.

- **Application to partnership.** Where a partnership (or LLC) incurs business interest expense, Code §163(j) applies first at the partnership level and second at the equity owner level. Just as for a C corp, subject to exceptions for certain categories of businesses, a partnership's deduction for business interest expense is limited to (a) the partnership's net business interest income plus (b) 30% of its "adjusted taxable income."

  At the partnership level, it is first necessary to determine which partnership-level interest expense, interest income, and other items of income and deduction are "properly allocable to a trade or business" and hence are included in the entity-level Code §163(j) analysis. For a C corp, as described above, all items of income and

[3]Former §163(j) was repealed by the 2017 Tax Act, generally effective 12/31/17.

deduction are generally treated as allocable to a trade or business, but for a partnership, only items of income and deduction allocable to trade or business activities are taken into account in applying §163(j), while those allocable to investment activities are disregarded in applying §163(j).

Temp. Reg. §1.163-8T provides a detailed set of rules (generally applying a "tracing" approach) for allocating items of interest expense among different activities for purposes of §163's limits on deductibility of investment interest and personal interest. Pending contrary IRS guidance, we think it would be reasonable for taxpayers to rely on these tracing rules for post-12/17 §163(j) purposes, so that where debt incurred by a partnership is used to fund a partnership expenditure, interest expense on the debt would be allocated to trade or business activities if the expenditure is part of a trade or business activity or to investment activities if the expenditure is part of an investment activity.

A partnership's "adjusted taxable income" for a taxable year is the partnership's taxable income for such year computed with certain adjustments. Most importantly, taxable income is adjusted to: (a) exclude any item of any income, gain, deduction, or loss not allocable to a trade or business, (b) exclude any business interest expense, (c) exclude any business interest income, and (d) for years beginning after 12/31/17 and before 1/1/22, exclude any depreciation, amortization, or depletion deductions.

- **Application first at partnership and second at partner level.** Code §163(j) contains five operative rules for applying §163(j)'s deduction limitation to a partnership and its partners.

First, to the extent partnership-level business interest expense is deductible at the partnership level—i.e., is not disallowed by the partnership-level §163(j) limitation—the business interest expense is deducted at the partnership level and allocated to the partners as a non-separately stated item of income or loss. Such business interest expense amount deducted at the *partnership level* is not treated as an item of business interest expense at the partnership level and is disregarded in calculating the *partner-level* §163(j) deduction limitation.

Second, any partnership-level business interest expense that is *not* deductible at the partnership level as a result of the partnership-level §163(j) interest limitation is treated as "excess business interest" expense allocated to each partner in the same manner as the partnership's non-separately stated taxable income or loss. That is, rather than being carried forward at the partnership level (as is the case for a C corp), the partnership-level non-deductible interest expense is allocated to the partners and is potentially deductible at the partner level, subject to the operative rules described below. The amount of excess business interest expense allocated to a partner reduces such partner's tax basis in the partnership, subject to possible

future reversal of such basis reduction if the excess business expense amount never becomes potentially deductible at the partner level (as discussed in *Fifth* below).

Third, *excess* business interest expense allocated from a partnership to a partner is deductible by the partner subject to the §163(j) limitation applied at the partner level subject to silo restrictions described in *Fourth* below. Such excess business interest expense that is not deductible at the partner level in a taxable year is carried forward to future years.

Fourth, under Code §163(j)(4)(B)(ii)'s silo restrictions, any *excess* business interest expense allocated by a partnership to a partner is treated as business interest expense paid or accrued by the partner *in the next succeeding taxable year in which such partner is allocated excess taxable income from such partnership, but only to the extent of such excess taxable income from such partnership*. Thus, if a partner is allocated excess business interest expense from a partnership, the partner may deduct such excess business interest expense only to the extent the partner is later allocated sufficient excess taxable income from the *same* partnership—even if the partner has large amounts of net business interest income and adjusted taxable income from other sources (including from other partnerships).

Once partnership-level excess business interest expense is treated as paid or incurred at the partner level, it is potentially deductible at the partner level, subject, however, to the partner-level §163(j) limitation. After the excess business interest expense allocated from a partnership to a partner has been fully treated as paid or incurred at the partner level as a result of sufficient excess taxable income allocations from that same partnership, additional annual excess taxable income allocations from that same partnership increase the partner's *non-siloed* annual adjusted taxable income amount, and hence increase the partner's Code §163(j) limitation for other business interest expense treated as incurred at the partner level, but do not increase the partner's ability to deduct *siloed* excess business interest expense allocated to the partner from other partnerships that has not yet been treated as paid or incurred at the partner level (by virtue of excess taxable income from the same partnership) and thus such siloed excess business interest expense continues to be subject to these silo restrictions.

Fifth, as noted in paragraph *Second*, a partnership's allocation of excess business interest expense to a partner produces a downward adjustment in the partner's tax basis in its partnership interest. If the partner disposes of the partnership interest before such excess business interest expense has been "freed up" for deduction at the partner level as described in *Fourth* above, the partner's tax basis in the partnership interest is increased, effective immediately before the disposition, by the amount of the unused excess business interest expense and the unused excess business interest expense evaporates.

Code §163(j) does not address the flow-through to partners of a partnership's business interest *income*. Notice 2018-28 announces Treasury/IRS intention to issue regulations providing that for purposes of calculating the partner-level §163(j) limitation, a partner can include the partner's share of the partnership's business interest income for the taxable year only to the extent of the partner's share of the excess of (i) the partnership's business interest income over (ii) the partnership's business interest expense.

- **Application to S corp.** Code §163(j)(4)(D) states that rules similar to the rules applicable to a partnership and its partners shall apply with respect to any S corp and its shareholders.

- **Businesses exempted from Code §163(j).**

  - **Small businesses.** Code §163(j) generally does not apply to a taxpayer with average gross receipts for the prior 3 taxable years of $5 million or less.

  - **Electing real property businesses.** An "electing real property business" described in Code §469(c)(7)(C) (i.e., "any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental operation, management, leasing, or brokerage trade or business") that makes an irrevocable Code §163(j) exemption election is not treated as a trade or business for purposes of Code §163(j).

    Making this election may have the effect of slowing the depreciation deductions available to the real estate business. An electing real property business is required to use the "alternative depreciation system" for non-residential real property, residential real property, and qualified improvements, and the 100% bonus depreciation allowance in effect for 2018–22 is not available for assets depreciated under the alternative depreciation system.

  - **Other exemptions.** Other exemptions are provided for floor plan financing interest, electing farming businesses, and certain utility businesses. See discussion at ¶1305.1.

- **Deferred taxation of qualified equity grants to at least 80% of corporation's employees.** Where a service provider is granted employer stock, purchases employer stock, or acquires employer stock upon exercise of a stock option, such service provider generally recognizes compensation income upon receipt of the stock (or, if the stock, when received, is subject to an SRF and the employee makes no Code §83(b) election, when such stock vests), in an amount equal to the stock's FV in excess of its purchase price (determined at the later of receipt or vesting). The employer

is allowed a compensation deduction and is required to withhold related income and employment taxes on the employee's OI at that time.

Code §83(i)—enacted in 12/17 and effective for stock acquired (including by NQO exercise) after 12/31/17—permits a "qualified employee" who receives "qualified stock" from an "eligible corporation" to defer taxation of such compensation income for up to 5 years.[4] This provision is intended to provide cash flow relief to an employee who would otherwise recognize compensation income (and owe income tax) on receipt of illiquid employer stock. However, because of §83(i)'s many complications, restrictions, and ambiguities, it is likely to be rarely utilized.

If all Code §83(i) requirements are met, the employee recognizes compensation OI equal to the stock's FV at the time the employee receives the stock (or at the stock's subsequent vesting if there is an SRF) less the stock's purchase price—i.e., the same OI amount as under Code §83(a)—but such compensation OI is not included in the employee's taxable income until the employee's taxable year that includes the *earliest* of:

- the 5th anniversary of the date the employee's stock ceases to be subject to an SRF,
- the first date any of the employer's stock becomes readily tradable on an established securities market,
- the date the employee's stock becomes "transferable (including . . . transferable to the employer)," apparently even if not actually transferred,
- the date the employee becomes an "excluded [generally highly compensated] employee," and
- the date the employee revokes the §83(i) election.

Deferred Code §83(i) income tax reporting is available only if 5 requirements are all satisfied:

First, the employee must receive "qualified stock," which means stock:

(i) of the corporation that employs the employee (or of a Code §414(b) related corporation),

(ii) received in connection with a stock option exercise or a restricted stock unit settlement, and

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[4]However, such §83(i) income deferral does not postpone the starting date for the employee's LTCG holding period with respect to the stock (i.e., the later of receipt or vesting).

(iii) with respect to which the employee has no right to "sell such stock to, or otherwise receive cash in lieu of stock from, the corporation at the time the rights of the employee in such stock first become transferable or not subject to" an SRF.

Second, the employer must be an "eligible corporation" in the calendar year in which the option or stock right is granted, which means:

(i) no stock of the corporation (or any predecessor) is (or was in any preceding year) readily tradable on an established securities market and

(ii) the corporation has in effect a written plan under which, in such calendar year, not less than 80% of all its U.S. employees are either (x) granted options or (y) granted restricted stock units "with the same rights and privileges to receive qualified stock."

It seems likely that the "same rights and privileges" requirement would be violated if stock options or restricted stock units issued to different employees had differing vesting terms or if those issued at the same time had differing purchase or exercise prices. But it may be permissible for stock options issued at different times during a calendar year to have differing exercise prices reflecting differing when-granted FV of the employer's stock so that the method for determining the purchase price was the same.

There is, however, no requirement that options or restricted stock unit grants issued during the calendar year be non-discriminatory in amount, so the 80% requirement could apparently be met by making small grants to some employees and larger grants to other employees, "so long as the number of shares available to each employee is more than a de minimis amount," although the meaning of "de minimis" in this context is far from obvious.

All corporations treated as a single employer under Code §414(b) are treated as a single corporation for Code §83(i) purposes, so that the 80%-of-all-employees-coverage requirement applies by aggregating the employees of either (i) an 80%-owned-parent-subsidiary corporate group or (ii) a more-than-50%-owned-by-5-or-fewer-persons brother-sister corporate group, and no member of such a parent-subsidiary or brother-sister group can have (currently or in the past) readily tradable stock.

Third, there are complex restrictions on the corporation's right to repurchase any of its outstanding stock while Code §83(i) stock rights are outstanding.

Fourth, the employee receiving the stock option or restricted stock unit must not be an "excluded employee," which is an individual who:

(i) is (or at any previous time was) the corporation's CEO or CFO,

(ii) is related to such a current or former CEO or CFO,

(iii) in such taxable year is or within the 10 preceding taxable years was 1 of the 4 highest compensated officers of the corporation, based on SEC 1934 Act disclosure rules, or

(iv) owns, during the current calendar year or at any time during the 10 preceding calendar years, 1% or more of the corporation's stock.

Fifth, the qualified employee must file a Code §83(i) election with IRS within 30 days after the applicable stock is no longer subject to an SRF. A §83(i) election is not permitted with respect to stock for which the employee has made a Code §83(b) election. See discussion at ¶1502.2.7.

- **New 3-year LTCG holding period requirement for carried interest.** An investment professional holding a "carried interest" in an investment partnership (i.e., a share of partnership profits disproportionate to contributed capital) benefits from flow-through tax treatment for her allocable share of favorable-character partnership income, including LTCG and QDI taxed at a maximum 20% federal rate. New Code §1061, effective for taxable years beginning after 12/31/17, imposes a special 3-year holding period requirement in order for an investment professional's carried interest gain to achieve LTCG (but not QDI) status.

Specifically, if an "applicable partnership interest" is held (directly or indirectly) by an individual, LTCG that would otherwise be recognized by the individual with respect to that interest is recharacterized as STCG to the extent such net LTCG exceeds the net LTCG that would have been recognized if the LTCG holding period was more than 3 years, rather than more than 1 year.

§1061 represents a significantly narrower change in the taxation of carried interest than had been proposed (but not enacted) in past years.

An "applicable partnership interest" is any partnership interest "which, directly or indirectly, is transferred to (or is held by) the taxpayer in connection with the performance of substantial services by the taxpayer, or any related person, in any applicable trade or business." An "applicable trade or business" is an activity conducted through one or more entities that "consists, in whole or in part of—(A) raising or returning capital and (B) either (i) investing in (or disposing of) specified assets (or identifying specified assets for such investing or disposition), or (ii) developing specified assets." "Specified assets" include corporate stock, debt instruments, equity interests in widely held partnerships, and real estate held for rental or investment.

The "applicable partnership interest" definition is clearly aimed at partnership interests held by investment professionals of private equity, venture capital, debt, and hedge funds who (a) typically share in fund carried interest or incentive allocations through partnership interests in the fund's general partner ("GP") entities, (b) acquire or hold such GP interests in connection with their performance of substantial services for the GP entity or for an affiliated management company entity, and (c) perform activities (through GP or management company entities) which include raising and/or returning capital as well as investing in, disposing of, identifying, and/or developing "specified assets" for the fund.

The statute provides three specific exceptions from the definition of "applicable partnership interest." First, Code §1061(c)(1) excepts "an interest held by a person who is employed by another entity that is conducting a trade or business (other than an applicable trade or business) and only provides services to such other entity." This exception appears intended to exclude from §1061 an employee of an operating business (e.g., a manufacturing corporation) who might own a partnership interest in a holding partnership that owns the stock of the operating corporation.

Second, Code §1061(c)(4)(B) excepts any capital interest in the partnership which provides the taxpayer with a right to share in partnership capital commensurate with the amount of capital contributed. This exception should apply where an investment professional invests capital in the fund (directly or through the GP entity) at the same time, and in exchange for the same interest in partnership capital, as passive fund investors.

Third, Code §1061(c)(4)(B) excepts "any interest in a partnership directly or indirectly held by a corporation." This exception appears to be broader than was likely intended. It is sensible to generally except C corps from Code §1061. Because C corps do not benefit from a reduced tax rate on LTCG, §1061's LTCG-to-STCG recharacterization is not relevant. But certain types of corporations do pass through the character of LTCG, most notably S corps and passive foreign investment companies that make a "qualifying electing fund" election. Treasury/IRS quickly announced in Notice 2018-18 its intention to issue regulations (retroactive to 1/1/18) providing that the statutory exemption from Code §1061 for partnership interests held by a "corporation" does not apply to a partnership interest held by an S corp. Although the legal authority for Notice 2018-18 and the intended regulations is questionable, they reach a sensible result and we doubt that many taxpayers will feel comfortable taking a position contrary to the predicted regulations.

Code §1061(b) contains a separate exception from Code §1061(a)'s recharacterization rule: "To the extent provided by the Secretary, subsection (a) shall not apply to income or gain attributable to any asset not held for portfolio investment on behalf of third party investors." This exception appears intended to exempt from the

recharacterization rule gains attributable to a PE fund's enterprise value (as distinct from value attributable to carried interest in assets held by the PE fund), although the benefit of this exception may be limited if it requires effectuating Treasury regulations.

The holding period relevant in applying §1061 is the holding period of the asset that is sold and produces gain recognized by the holder of the applicable partnership interest. Thus, where an investment fund sells an asset at a gain, §1061 focuses on the fund's holding period in such asset, rather than the investment professional's holding period in the partnership interest with respect to which he is allocated such gain. See discussion at ¶1505.2.1.

- **Expansion of Code §162(m) $1 million limit on compensation deduction for public corporation's top executives.** Code §162(m) limits a corporation's federal income tax deduction for compensation of all types (including cash, SRF stock, and the spread in an option or SAR) paid or accrued to certain high-level executives to $1 million per executive per taxable year, generally applicable only to a publicly held corporation, i.e., with a class of securities covered by 1934 Act §12(b), §12(g), or §15(d).

  The 12/17 Tax Act substantially expanded §162(m)'s scope by:

  (a) eliminating exceptions for performance-based compensation and commission income,

  (b) enlarging the class of corporations to which §162(m) applies (from corporations with *common* stock publicly held to corporations with any securities [including preferred stock and debt] publicly held),

  (c) expanding the definition of a publicly held corporation by adding a corporation covered by 1934 Act §15(d),

  (d) expanding the category of "covered employees" to include each CEO, CFO, acting CEO, acting CFO at any time during the year, plus each of the 3 highest compensated officers for such year included in the corporation's 1934 Act SEC report of the highest compensated officers during such year (other than CEO or CFO), so that a publicly held corporation can have more than 5 covered employees,

  (e) adopting a once-a-covered-employee-after-2016, always-a-covered-employee approach, so that even post-retirement deferred compensation paid to a former (post-2016) covered employee continues to be subject to §162(m)'s limitation.

  These 2017 Tax Act §162(m) changes (including for performance-based compensation) apply to a corporation's taxable year beginning after 12/31/17 (i.e., 2018 for a calendar-year corporation), unless the compensation is covered by a

written binding contract in effect on or before 11/2/17 and not subsequently materially modified. See discussion at ¶1509.

- **Use of bifurcated (C corp owned by partnership/LLC) approach to new business formation after 2017 Tax Act.** For the reasons discussed below a group of capital providers and service providers forming a new business might decide to utilize a C corp to own the business, with the stock of the C corp wholly or principally owned by a parent partnership or LLC, and the parent partnership/LLC in turn owned by the capital providers and service providers:

  (1) The low 21% federal corporate income tax rate (beginning 1/1/18) allows the parties (by accumulating all of the business's after-tax earnings in the lower-tier C corp) to devote a full 79% of the business's earnings (ignoring state income taxes) to business expansion while avoiding a second tax on dividends (or on capital gain so long as neither the upper-tier partnership/LLC nor its equity owners sell their ownership interests, perhaps forever if the equity owners ultimately obtain stepped-up stock basis at death), as discussed at ¶106.3.1 and ¶1602.1.

  (2) Delaware partnership/LLC law (if the parent partnership or LLC is formed in Delaware) allows the *unincorporated* parent entity's majority owners to virtually eliminate fiduciary duty claims from the minority equity owners (including future minority investors who subsequently invest in the partnership/LLC)—e.g., if the minority equity owners disagree with the majority owners on timing or pricing for an ultimate sale of the business—a goal the majority owners could not achieve if the business were simply formed as a corporation (since waivers of *corporate* fiduciary duties are generally not valid) without a partnership/LLC holding company. See discussion at ¶1602.3.

  (3) With proper structuring, the service providers can acquire partnership/LLC profits interests in the holding partnership/LLC which are subject to Rev. Proc. 93-27's more pro-service-provider-LV rules than are §83's FV rules for corporate stock. See discussion at ¶1505.1(2) and (3) and ¶1602.1.

  On the other hand, where (as described above) the business is structured as a parent partnership/LLC owning a subsidiary C corp, the top partnership/LLC's equity owners would not be able to take advantage of Code §199A's potential individual (up to 20%) OI rate reduction because the business's profits would be earned in the C corp rather than in a pass-through entity. See discussion at ¶106.3.5.

- **Delaware fiduciary duty rules for partnership or LLC's GP/managing member.** Although Delaware partnership/LLC law grants a partnership/LLC substantial leeway

to contract (by clear provisions in the entity's basic agreement) the extent of a GP's or managing member's fiduciary duty, it prohibits a partnership/LLC from limiting or eliminating the "statutory implied covenant of good faith and fair dealing."

A 2018 Delaware Chancery Court opinion dealt with T, a closely held LLC which was majority owned by a private equity investment fund (the "Fund") and minority owned by T's founder and others (the "minority owners"). Under T's distribution waterfall, on a sale of T the Fund was entitled to most of the first tranche of proceeds (in an amount equal to approximately 200% of the Fund's investment in T), the minority owners were then entitled to most of a second tranche of proceeds (if any), while layers of proceeds, if any, in excess of the first two tranches were then to be shared by the Fund and T's minority owners in various ratios.

T's LLC agreement not only waived all fiduciary duties, but also (i) designated affiliates of the Fund as a majority of T's governing board and (ii) obligated all of T's minority owners to consent to any sale of the LLC approved by the (Fund-dominated) governing board, subject to "the single safeguard that [such] sale must not be to an insider."

Without conducting an open sale process, the board (dominated by the Fund) approved a private sale of T for $43 million, virtually all of which would go to the Fund by virtue of its senior position (i.e., the first tranche) in the LLC distribution waterfall. The minority owners objected and requested that the governing board conduct an open sale process (which the Fund and the governing board refused to do).

The minority owners nevertheless obtained a "non-binding indication of interest" from another potential bidder for a higher price—between $50 million and $60 million—which would have yielded the minority owners significantly more proceeds than they would receive in the Fund's proposed $43 million sale of T, while yielding the Fund approximately the same proceeds as in the $43 million proposed sale, because most of the proceeds above $43 million would have gone to the minority owners (by virtue of their rights under the second tranche of the distribution waterfall).

The Fund rejected the minority owner's requests and consummated the $43 million sale of T.

The court commented that "if the parties had chosen to employ the corporate form . . . , with its common law fiduciary duties, [the sale process] . . . would [have been] subject to entire fairness review," but instead the parties "forwent . . . common law protections available with the corporate form, and instead chose to create an LLC" with fiduciary duties waived and "with the single safeguard that the sale must not be to an insider."

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The court stated that "the implied covenant [of good faith and fair dealing] is a cautious enterprise, . . . rarely invoked successfully, . . . [and] only where one party proves the other party acted arbitrarily or unreasonably . . . [thus] frustrating the fruits of the bargain that the asserting party reasonably expected . . . [as] measured . . . [at] the time of contracting [and which arose out of] . . . developments or contractual gaps that . . . neither party anticipated . . . [at the time of contracting]. The term *fair* is something of a misnomer here; it simply means actions consonant with the terms of the . . . agreement and its purposes, [so that] . . . any implied obligation must be consistent with the terms of the agreement as a whole."

Hence for the doctrine to apply "the contract [must] in fact contain . . . a gap that must be filled" and it must be "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach . . . had they thought to negotiate with respect to that matter."

The court concluded that "The parties explicitly addressed the potential for self-dealing . . . by providing that the board does not retain sole discretion to sell the company to insiders . . . . [But there was no provision in the LLC agreement] to proscribe the manner in which [T would be] . . . marketed and sold." Thus "there is no gap in the parties' agreement to which the implied covenant may apply." See discussion at ¶1602.3(4).

- **Utilizing representation and warranty insurance.** When P is acquiring T, negotiating extensive contractual representations and warranties ("R&W") regarding T's assets, liabilities, financial statements, customers, profitability, etc., is often highly contentious, as are the contractual ceilings, deductibles, and time limits for post-closing damage/indemnification claims. A reasonably recent development, which is becoming increasingly popular, is R&W insurance, i.e., buying an R&W insurance policy from an insurance company as an alternative to T or T's equity owners being liable for contractual R&W breaches after the acquisition has been consummated.

  Often buyer and seller work together—sharing the cost of the premium paid to the R&W insurance company—to buy such an insurance policy with a stated maximum insurance amount and specified deductibles.

  Such an R&W insurance policy can replace all or a large portion of the seller's contractual R&W indemnification risk in exchange for a premium which is typically 3% to 4% of the amount of insurance coverage. For example, if the acquisition price P is paying for T is $100 million, P might seek an R&W insurance policy with total coverage between 10% and 50% of the acquisition purchase price, i.e., between $10 million and $50 million of insurance coverage on a $100 million acquisition. The premium payable to the insurance company—typically 3% to 4% of the insurance coverage—would

thus be in the $300,000 to $400,000 range for $10 million of insurance coverage or in the $1.5 million to $2 million range for $50 million of insurance coverage.

The R&W insurance policy would typically call for a "retention amount" (similar to a deductible) equal to 1% to 1.5% of the acquisition price, so on a $100 million acquisition P and/or T (or T's owners) would bear the first $1 million to $1.5 million of R&W losses before the insurance kicks in. And the insurance company would then cover losses (in excess of the retention amount) up to the policy amount.

Although subject to negotiation between P and T, both the premium and the retention amount are often split between P and T (or T's owners), possibly 50-50.

There are generally 3 differences in coverage between R&W insurance and traditional seller R&W contractual liability. First, with R&W insurance there is typically no coverage for matters of which P's deal team is aware, such as (i) risks listed on T's disclosure schedules, (ii) risks P uncovers during its diligence, and (iii) risks P's deal team learns about during the period between signing the acquisition agreement and closing the acquisition.

Second, there is typically no insurance coverage for issues P has not sought to diligence, in which case the insurer is wary of covering them.

Third, insurance coverage commonly excludes areas the insurer has great difficulty getting its arms around, for example:

- environmental issues, like asbestos/PCBs/fluorocarbons,
- pension withdrawal and underfunding,
- healthcare reimbursements,
- cybersecurity,
- product warranty/liability/recall,
- Foreign Corrupt Payments Act liability,
- employee wage and hour claims, and
- China-related risks.

However, P can seek to bridge the gap (where there is no insurance coverage) by obtaining a traditional contractual R&W clause in the acquisition agreement with respect to T's (or T's owners') liability for specific risks excluded from the R&W insurance policy.

On the other side of the ledger, R&W insurance can include protection on some issues for periods beyond that which P could expect to obtain from traditional contractual R&W. For example, insurance often covers breaches of most R&W for up to 3 years

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after the acquisition and breaches of fundamental R&W (including undisclosed tax liability) for up to 6 years after the acquisition.

The typical R&W insurance process often takes only 7 to 14 days, which includes:

1st engaging a broker to run the insurance process,

2nd obtaining quotes from one or more R&W insurance companies,

3rd negotiating rates and terms and selecting an insurer,

4th providing all third-party diligence reports to the insurer and allowing the insurer several days to digest this information and review T's data room materials,

5th arranging and participating in one or more underwriting calls so the insurance company's underwriters and lawyers can question P's lawyers and in-house deal team,

6th negotiating any specific exclusions proposed by the insurer based on its diligence findings, and

7th negotiating the insurance policy's terms and premium. See discussion at ¶1702.13.2.

- **U.S. Supreme Court overrules prior decisions which protected T selling shareholders from fraudulent conveyance claims in failed LBO.**

  - **Application of fraudulent conveyance doctrine to LBOs.** Where Newco acquires T in an LBO, the transaction is frequently structured so that T's old unsecured creditors are prejudiced—generally because the proceeds from the substantial acquisition debt are paid out to T's old shareholders while the acquisition lenders acquire a claim against T's old assets which (if secured) is superior to T's old unsecured creditors or (if not secured) is pari passu with T's old unsecured creditors. If the Newco-T enterprise goes bankrupt reasonably soon after the LBO, T's old creditors (and in some circumstances T's new trade and general creditors) will often assert a fraudulent conveyance claim against (a) the LBO acquisition lenders, (b) T's old shareholders, and (c) the LBO's private equity sponsors.

    The validity of such a fraudulent conveyance claim generally turns on whether Newco/T, immediately after the LBO, either:

    (1) was insolvent (debts greater than asset FV),

    (2) was inadequately capitalized, or

    (3) did not reasonably expect to be able to pay its obligations as they mature in the ordinary course of business.

- **Pre-2/18 federal court decisions generally exempted T shareholders from fraudulent conveyance claims.** Prior to 2/18 five federal courts of appeals interpreted vaguely worded Bankruptcy Code §546(e) as protecting an old T shareholder from fraudulent conveyance attack (where T becomes bankrupt soon after an LBO in which T's unsecured creditors were prejudiced) if such shareholder received its proceeds thru a bank or brokerage firm, even if such firm was acting as a mere intermediary or conduit (not as a principal), while two federal courts of appeals interpreted §546(e) as not affording such protection.

- **Supreme Court 2/18 decision.** In 2/18 the U.S. Supreme Court resolved the conflict, concluding that the court must "look to the transfer that the [bankruptcy] trustee seeks to avoid," i.e., to the cash transfer from Newco to the old T shareholders, not to "any component parts of the overarching transfer." Thus §546(e) does not apply where the cash "transfer [from Newco to the old T shareholders] was not made by, to, or for the benefit of a financial institution" because the bank's activities as intermediary or conduit "are simply irrelevant to the analysis under §546(e)."

  Thus, after this 2018 decision, §546(e) is unlikely to serve as a post-LBO defense by T's old shareholders to a fraudulent conveyance claim. See discussion at ¶1706.3.6.

- **HSR filing for acquisition.** A Hart-Scott-Rodino ("HSR") filing with FTC/DOJ is required if the size of an acquisition or investment (and, in certain cases, the size of the parties to the transaction) exceeds specified numerical tests.

  - *Annual inflation adjustment*. The authors have updated the HSR discussion to reflect the 2/18 annual inflation adjustment of all relevant HSR tests, thresholds, and filing fees.

  - *Non-compliance penalty*. A party failing to comply with HSR reporting and waiting period requirements is subject to a civil penalty which (effective 1/22/18) increased to a maximum of up to $41,484 per day during the non-compliance period. See discussion at ¶1707.

- **. . . and much, much more . . .**

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