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THE PIB REPORT

The Tax Cuts and Jobs Act, SAB No. 118, CDI 110.02, and Deferred Tax Assets and Liabilities

On December 22, 2017, the Tax Cuts and Jobs Act (the "Act") was signed. Its corporate tax provisions contain changes that are favorable to corporate taxpayers, particularly the reduction in rates from 35% to 21%. They also contain changes that will have adverse effects on a corporation's tax calculation, such as the "transition tax" on certain undistributed earnings of foreign subsidiaries, the "global intangible low taxed income" ("GILTI") inclusion for certain income of foreign subsidiaries, the "base erosion and anti-avoidance tax" charge ("BEAT") on deductible payments from U.S. companies to foreign affiliates, a reduction in the dividends-received reduction, and modifications to future NOL limitations. The changes impact not only a corporation's tax calculation, but also the calculations for financial accounting purposes of its tax expense, and related items such as its deferred tax assets ("DTA") and deferred tax liabilities ("DTL").

Accounting literature states the basic rule that the effect of tax rate changes should be taken into account in the period in which the changes are enacted, *e.g.*, for a calendar year entity, in the fourth quarter of 2017. Compliance with that basic rule for every affected item is a practical impossibility for many taxpayers, and on the date of enactment of the Act, the SEC issued Staff Accounting Bulletin No. 118 (the "SAB"), as well as Form 8-K Compliance and Disclosure Interpretation 110.02 ("CDI 110.02"). Subsequently, FASB discussed several topics related to the income tax accounting for the Act at its early January 2018 meeting, and also issued a Q&A to the effect that it would not object to private companies following the principles of the SAB.

The guidance in the SAB was informed by guidance provided by FASB after enactment of the American Jobs Creation Act of 2004, as well as by guidance addressing accounting for certain items in a business combination where the information is incomplete. This article discusses the SAB guidance, which is both quantitative (regarding the calculation of tax expense), and qualitative (regarding disclo sures).

Quantitative Guidance: Generally, the SAB sets forth a three-part rule regarding the calculation of tax expense: (1) if the accounting for an item is complete, the item should be appropriately reflected in tax expense; (2) if the accounting for an item is not complete, but the company can determine a reasonable estimate, that reasonable estimate should be included in the financial statements as a provisional amount; and (3) if there is not sufficient information to arrive at a reasonable estimate, the item should be reported without showing any changes. Required adjustments to tax expense should be included in income from continuing operations.

Subsequently, as more information becomes available, provisional amounts should be adjusted and finalized. Similarly, as information becomes available to provide a reasonable estimate regarding items for which one was not previously available, a provisional amount should be established, subsequently adjusted if necessary, then finalized.

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Similarly, as information becomes available to provide a reasonable estimate regarding items for which one was not previously available, a provisional amount should be established, subsequently adjusted if necessary, then finalized. Adjustments to tax expense should be made during the "measurement period," *i.e.*, the period beginning with the reporting period that includes the date of enactment, and ending on the earlier of the time the changes are completed, or one year from the enactment date.

The SAB provides an example that deals with the transition tax ("TT") mentioned above. The TT applies to controlled foreign corporations and to foreign corporations that have a U.S. corporate shareholder that owns at least a 10% voting interest. Each such corporate shareholder is required to pick up its share of the foreign company's post-1986 earnings and profits as of November 2, 2017 or December 31, 2017, whichever amount is greater. The portion of that E&P that consists of liquid assets is taxed at 15.5%, and the balance (attributable to illiquid assets) is taxed at 8%. The inclusion applies for tax years beginning after December 31, 2017; the TT can be paid in eight annual installments.

Example 1 in the SAB assumed that Company X was a 10% shareholder of a foreign company, and had no previously recognized a DTL related to unremitted foreign earnings, *i.e.*, it had been able to rebut the repatriation assumption. Thus, under the accounting literature, Company X must establish a liability for the TT for the period of enactment. But Company X did not have the necessary information "available, prepared or analyzed" to develop a reasonable estimate of its TT liability, or to evaluate the TT's impact on its assumption of continuous investment. Thus, the SAB states that the Company should not include a provisional amount for the TT in its financial statements that include the fourth quarter. But it should do so in the first reporting period in which sufficient information becomes available, prepared or analyzed to develop a reasonable estimate, then ultimately complete the accounting and finalize the amount. Example 1a describes circumstances in which a provisional amount initially could be established for the TT, and subsequently, additional information, analysis, etc. allowed the accounting to be completed and the adjustment to be finalized.

In Example 2, the Company had previously established a DTA, and was able to revise its measurement of the DTA based on the new rates. But it did not yet have sufficient information to determine whether a valuation allowance should be recognized or released. Example 2 indicates that the valuation allowance determination should be deferred until the information, *etc*. regarding that becomes available.

Qualitative Guidance: The Interpretive Response to Question 2 of the SAB indicates that a reporting entity should include financial statement disclosures regarding the material financial reporting impacts of the Act for which the accounting is incomplete, including qualitative disclosures of the income tax effects of the Act for which the accounting is incomplete, disclosures of items reported as provisional amounts, disclosures of existing current or deferred tax amounts for which analysis of the income tax effects of the Act are incomplete, the reason why the accounting is incomplete, additional information needed to complete the accounting, the nature and amount of any adjustments recognized during the reporting period, the effect of those adjustments on the effective tax rate, and the time when the accounting for income tax effects of the Act has been completed.

CDI 110.02 and the FASB Meeting: CDI 110.02 indicated that remeasurement of a DTA to reflect tax rate changes does not create material changes that trigger the need for additional Form 8-K disclosures. And at the January 2018 FASB meeting, a series of interesting issues arose regarding accounting for tax reform. Among other items, the Board addressed whether it was appropriate to discount the TT liability (payable over eight years) as well as refunds or credits from AMT carry-forwards and agreed that those amounts should not be discounted. Aspects of BEAT and GILTI were discussed. The Board voted to add a project to address the accounting effects of tax law changes that may otherwise be stranded in "accumulated other comprehensive income" ("AOCI") by virtue of the rate reduction. For example, unrealized securities gains are held in AOCI and historically have been adjusted to reflect a 35% tax rate. The effect of the rate reduction to 21% is run through current earnings and into equity causing a mismatch between equity and AOCI. On January 18, 2018, FASB followed up with a proposal to reclassify such stranded tax effects from AOCI to retained earnings; the proposal is on a fast track and comments were due by February 2, 2018.

Proper adjustments to DTAs and DTLs are particularly important to

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members of regulated industries, such as banks, insurance companies and gas, electric and water companies as they may affect regulatory capital requirements. For example, the system of accounting for regulated public utilities generally requires taxes to be directly passed through the consumers as part of "cost of service." Some states have already implemented appropriate reductions, and, on January 9, 2018, a number of States Attorneys General wrote to FERC to raise this issue. ■

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Federal Government Expands Its Scrutiny of Crypto-Currencies

On January 19, 2018, the Securities and Exchange Commission ("SEC") and the Commodities Futures Trading Commission ("CFTC") issued a joint statement from the Co-Enforcement Directors of the SEC and the Enforcement Director of the CFTC where both agencies announced continuing scrutiny of offerings and trading in crypto-currencies. In the statement, the SEC and the CFTC stated that they would look "beyond the form, examine the substance of the activity and prosecute violations of the federal securities and commodities laws."

This statement was followed on by an op-ed published in the Wall Street Journal on January 24, 2018, by SEC Chairman Clayton and CFTC Chairman Giancarlo which stated in part: "The CFTC and SEC, along with other federal and state regulators and criminal authorities, will continue to work together to bring transparency and integrity to these markets and, importantly, to deter and prosecute fraud and abuse."

The SEC and CFTC are sending a clear signal to issuers and traders in crypto-currencies that these agencies will be stepping up their enforcement activities. ■

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Boilerplate Provisions in Contracts: What They Mean and Why You Shouldn't Overlook Them

Boilerplate provisions are contractual provisions that are included in most corporate and commercial agreements, often towards the end of an agreement. These provisions are generally viewed as standard and non-controversial, so the parties do not spend much time negotiating them. However, they can have significant practical implications for the parties, and are necessary for the effective enforcement of each party's rights under the agreement. It is important to understand how these provisions affect the operative terms of the agreement and construct them so there will not be any conflicts or unintended consequences. The following are explanations of a few of these boilerplate provisions along with some considerations when negotiating them.

Entire Agreement (sometimes called the merger or integration provision): Parties generally want to ensure that all of their obligations are recorded in one written agreement. This provision prevents the parties from being liable for any understandings, agreements or representations and warranties other than those

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expressly set out in the agreement. If there are ancillary documents and you do not want this agreement to supersede such documents, you should include the language in parentheses above so that those documents are includes as part of what makes up the "entire agreement." If there is a particularly important ancillary document that you want to ensure does not get superseded, consider naming it specifically. Further, it is important to ensure that all of the provisions that you expect in the agreement are included, because you could be barred from bringing a claim based on understandings, agreements, representations or warranties not expressly included in the agreement.

Notices: Generally, a comprehensive notice provision specifies:

- that all notices and communications must be in writing;
- who should receive the notice;
- where the parties should send notices (i.e., each recipient's address);
- the accepted methods of delivery (such as nationally recognized courier service, certified mail, fax or e-mail); and
- when the notice is considered received and effective.

If a contract includes a notice provision, you should ensure that any notices and communications you send comply with the requirements. Accordingly, if an agreement does not provide for email as an effective method of delivery, an emailed notice without a follow-up copy sent by other required means may be considered void and ineffective. Some jurisdictions require strict compliance with a contract's notice provisions, while others allow for substantial compliance when there is constructive or actual notice by other means.

Assignment: In many cases the assignment provision prohibits a party from assigning its rights under the agreement without the other party's written consent. Before agreeing to this provision, it is important to consider whether you want to have the right to assign your rights under the agreement in certain cases. For example, you may want the right to permit assignments to: (i) affiliates or subsidiaries; (ii) a successor upon a change of control (e.g. merger, sale of substantially all of your assets, sale of more than 50% of your voting equity); or (iii) your lenders as collateral security. If the agreement is an important one to your business, the right to assign upon a change of control may be particularly important, because such a right will allow you to assign the agreement to a buyer of your business/equity without having to worry about obtaining the consent of the other party (and may give you more leverage in negotiations with the buyer because the assignment is not conditioned upon such consent).

Attorneys' Fees (sometimes called Enforcement Costs): While federal and state courts routinely award the prevailing party reimbursement of its costs, what constitutes costs varies by state and generally only includes attorneys' fees if a statute provides for them or if the parties contractually agree. Therefore, it is important to determine whether you want to include such a provision in the agreement. If you are more likely to bring a legal action (e.g. you are the buyer in an acquisition agreement), you may want to include such a provision. On the other hand, if you are more likely to be defending a legal action (e.g. you are the seller in an acquisition agreement), you may prefer to exclude such a provision. Further, if the other party has deeper pockets, you may want to include such a provision. When negotiating and drafting the "Attorneys' Fees" provision, you should consider whether the prevailing party should be entitled to its "actual" fees and costs or only "reasonable" fees and costs (in some jurisdictions, the amounts of these awards may be limited by statute or otherwise may be within the judge's discretion). Some provisions even detail what comprises "attorneys' fees," including paralegal fees, administrative costs, investigative costs, costs of expert witnesses, court reporter fees, sales and use taxes, and all other charges billed by the attorneys to the prevailing party. Further, you should consider whether the provision should cover only those claims brought to enforce the terms of the agreement or should also cover any claim that may be related to the agreement.

Governing Law: In general, parties should choose the law of a state that has a relationship to the parties or the transaction (or there should be some other reasonable basis for the choice). Otherwise, the governing law provision may be unenforceable. In most cases, you probably will rather have the governing law state be your "home" state, but you may also want to consider with your attorney other factors such as which state has more favorable substantive laws applicable to the matters covered by the agreement, and how developed the law is in the state being considered. An agreement does not have to specify the laws of only one state. can designate certain matters be governed by one state's laws, while other matters are governed by another state's laws. This provision is often combined with the "Submission to Jurisdiction" provision.

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The parties should take care to use language in the governing law provision that is broad enough to cover both tort and contract claims. Parties may be surprised to learn that some courts have found that the standard wording of the governing law provision does not encompass tort claims (see Krock v Lipsay, 97 F.3d 640, 645 (2d Cir. 1996). In addition, other courts have applied the statute of limitations of the forum state rather than the governing law state because the agreement did not specify that the statute of limitations of the governing state applied. In *Pivotal Payments Direct Corp. v Planet Payment, Inc.*, 2015 WL 11120934, at *3 (Del. Super. Ct. Dec 29, 2015), the court applied the forum state of Delaware's three-year statute of limitations for fraudulent inducement claims arising out of a contract that stated New York law would govern (and New York has a six year statute of limitations for such claims). Such a difference could have a significant impact on the outcome of a case.

Submission to Jurisdiction (sometimes called Jurisdiction; Venue or Forum Selection): This provision sets forth the forum in which a claim can be brought (as opposed to the Governing Law provision, which provides which state's law governs). The designated forum does not have to be in the state whose laws govern the agreement. Like the Governing Law provision, in most cases you probably will rather have the forum be your "home" state (for both financial and administrative reasons), but you should also consider with your attorney whether a particular forum has specific procedural advantages. If the parties cannot agree to jurisdiction in one location, they can include jurisdiction in multiple locations (e.g. an action brought by one party must be brought in the other party's "home" state, and vice versa).■

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New Jersey Property Tax Appeal Deadline

The deadline to appeal property tax assessments in New Jersey for tax year 2018 is quickly approaching. For most taxing districts that deadline is April 1, 2018. In taxing districts that have implemented townwide reassessments or revaluations, the filing deadline is May 1, 2018.

Taxpayers should receive their Notice of Assessment in February 2018. For taxpayers in municipalities undergoing a revaluation these notices may go out later. If you lease or own property and believe the assessment does not reflect the fair market value of your property, after application of the applicable common level ratio, you should determine whether to file a tax appeal.

There are a variety of factors in deciding whether to file a property tax appeal. Our Real Estate group at PIB Law is experienced in developing strategies and counseling for pursuing property tax relief. We offer a complementary review and recommendation on whether a tax appeal may be warranted in your case.■

For more information or a preliminary review of your property, please contact Mark Mako at mark.mako@piblaw.com or Tom Dolan at thomas.dolan@piblaw.com.

PIB Law Obtains Favorable Decision in New York's Appellate Division Regarding Co-Op Foreclosure

On November 28, 2017, in JPMorgan Chase Bank, National Association v. Lu (Index No. 155360/13), PIB Law obtained a favorable decision from New York's Appellate Division, First Department, which unanimously affirmed the lower court's order denying a motion to vacate default filed by the defendant borrower (the "Borrower").

Borrower executed a Note to Plaintiff in December 2007, secured by a loan security agreement executed by Defendant to Plaintiff for (1) shares of capital stock of 408 West 57th Owners Corp. (the "Co-op") and (2) a proprietary lease in Apt. 10K, 408 West 57th Street, New York, New York 10019 (the "Property"). After Borrower defaulted on the loan, a non-judicial foreclosure sale was held on May 23, 2012. After the sale, the Co-op received an unsworn written statement from Borrower, stating that the Co-op did not have the right to transfer Borrower's shares to the winning bidder. As such, the Co-op informed Chase that it would not transfer the shares without a judicial determination of the shares' rightful owner.

On June 26, 2013, Chase filed a Summons and Complaint seeking a declaratory judgment determining rights to the Property. Borrower did not respond to the Complaint.

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During the pendency of the action, the non-judicial foreclosure sale was voluntarily rescinded. Following the rescinding of the sale, Chase filed a motion for Summary Judgment, which was granted on January 30, 2014. A second non-judicial foreclosure sale was held on September 24, 2014, and this time the top bidder was the Co-op. Borrower moved to vacate the sale of the property to the Co-op, and later moved to vacate her default. The lower court denied both motions.

On appeal, the Appellate Division affirmed the lower court's decision that Borrower failed to demonstrate a reasonable excuse for her default. The Appellate Division also affirmed that Borrower's denial of receipt of the summons and complaint failed to rebut the presumption of service created by the "detailed, validly executed affidavits of service" by Chase.

As the Appellate Division recognized, Borrower's unsupported contention that she relied on assurances from the cooperative corporation that her property would be protected and that she need not answer the complaint was insufficient. Moreover, Borrower failed "to explain why the co-op would have so assured her."

The record demonstrated that Borrower knew that she defaulted on her loan, that she received multiple notices of default from the bank and its intent to collect the debt, and to foreclose and sell the property at auction, if necessary. Given the circumstances, the Court concluded that Borrower "fail[ed] to show how her reliance on any alleged assurances from the co-op could have been reasonable."

The Appellate Division concluded that, given that Borrower did not provide a reasonable excuse for her default, it need not consider whether Borrower had a meritorious defense. ■

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