UNITED STATES

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

Comprehensive U.S. tax reform was passed in December 2017. This reduced the federal corporate income tax rate from graduated rates up to 35% to a flat 21% rate. Investors in partnerships and S corporations may receive a 20% deduction for an individual investor's share of qualified taxable income beginning in 2018, subject to certain limitations.

Interest paid by a U.S. entity in excess of 30% of adjusted taxable income (approximately EBITDA) for tax years between 2017 and 2022 is not deductible for tax purposes. For tax years after 2022, a more restrictive definition of adjusted taxable income applies (approximately EBIT). Disallowed interest can be carried forward indefinitely and deducted in a year when current interest expense falls below the limitation.

The international tax rules became even more complex with the passage of tax reform. Deferral of the tax on the earnings of controlled foreign corporations owned by U.S. companies has been further limited by new rules that will generally tax most foreign earnings. Large corporations with at least $500 million in average gross receipts are subject to minimum tax on base eroding payments to foreign related parties. U.S. corporate shareholders who own at least 10% of a foreign corporation are now eligible for a participation exemption for dividends received from the foreign corporation.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

a. Plan 6 – For domestic political reasons the United States has not ratified any new income tax treaties in the last several years. Nevertheless, most of the existing US treaties and the US Model Treaty contain Limitation on Benefits articles that are intended to limit misuse. Moreover, unilateral domestic legislation has been enacted that should greatly reduce the incidence of double non-taxation of the worldwide income of domestic enterprises.

b. Plan 15 – The United States is unlikely to become a signatory to the Multilateral Instrument.

c. EU directives do not apply to the United States.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

a). A share acquisition generally does not result in the recognition of gain or loss at the entity level. The tax attributes of a company (such as operating loss and credit carryforwards, as well as accounting methods and tax basis in assets) generally survive a share acquisition, although loss and credit carryforwards may be subject to a limitation following an ownership change.

The gain on the sale of stock is generally capital and therefore subject to preferential rates if the seller is an individual. Foreign persons are not generally taxed in the U.S. on gains from the sale of a corporation's stock, except where the corporation is a U.S. real property holding corporation. However, certain disclosure and withholding rules may apply to stock transfers to non-U.S. resident buyers (entities or individuals). Assuming there is no Section 338 election, there would be no step-up in the tax basis of the underlying assets.

b). Conversely, an asset acquisition generally results in the recognition of gain or loss by the selling company, as well as at the owner level if the proceeds of sale are distributed. Losses and credits may be used to offset the tax liability resulting from the sale, but do not carry over to the purchaser. The purchaser takes a cost basis (generally fair market value) in the acquired assets.

Historical income tax liabilities of the target business ordinarily do not carry over to the acquirer. These liabilities remain with the seller unless there is a contractual agreement specifically providing otherwise. However, certain non-income tax liabilities (sales and use, payroll, and property) may be inherited by a buyer of the business assets.

A major advantage of a taxable asset purchase is that, in the instance where the seller recognises gain, the buyer receives a corresponding step-up to fair market value in the basis of the acquired assets, generally resulting in increased future depreciation or amortisation deductions for the buyer. Existing tax attributes, such as net operating losses, do not carry over to the purchaser. However, asset sales may result in significant taxes. Many states and local jurisdictions impose sales and use tax on asset transfers, though occasional or isolated sale exemptions often apply. Real property is generally subject to realty transfer or documentary stamp tax.

It should also be noted that asset sales may give rise to both ordinary income and capital gain (taxed at a reduced rate for individuals). In the case of a disposition of a U.S. business by a foreign person, gain is ordinarily treated as effectively connected income subject to U.S. tax. Under recent legislation, the sale of a partnership interest by a foreign person is treated as the sale of that person's share of the U.S. business assets of the partnership.

c). If an acquisition takes the form of a "reorganization" in which a substantial part of the consideration is paid in the form of equity of the acquiring company, gain recognized by selling shareholders may be limited to the amount of non-equity consideration received, and gain or loss may not be recognized at the company level with respect to asset transfers. To the extent gain is not recognized, exchanging shareholders receive a carryover basis in the shares they receive, and the basis of the corporation's assets is not increased. A reorganization may take the form either of a stock acquisition or an asset acquisition.

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

Elections are available by which the parties (or in some cases, the seller or buyer unilaterally) may choose to have a share purchase treated as an asset purchase. In that case, selling shareholders will be taxed on the gain on their shares, and the corporation will also be taxed on the gain inherent in its assets. The corporation will be treated thereafter as a newly organized company that purchased its assets. Its tax history and attributes will be eliminated, and it will start over with a fair market value basis in its assets. These elective provisions do not apply to a transaction in which gain is not recognized.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Intangible assets (including goodwill) acquired as part of a trade or business are amortised using the straightline method over a 15- year period. Intangible assets not acquired as part of a trade or business are generally amortised using a straight-line basis over their estimated useful lives. Software not acquired as part of a trade or business may be amortised using the straight-line method over three years.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

Thin Capitalization: Interest paid by a U.S. entity in excess of 30% of adjusted taxable income (approximately EBITDA) for tax years between 2017 and 2022 is not deductible for tax purposes. For tax years after 2022, a more restrictive definition of adjusted taxable income applies (approximately EBIT). Disallowed interest can be carried forward indefinitely.

Debt or equity considerations: Purported indebtedness may be reclassified as equity if the terms of the instrument cause it to resemble equity rather than debt. Interest on debt that is reclassified may be recast as a nondeductible dividend. Whether an instrument is reclassified is highly subjective and fact intensive. Courts rely on several factors, and no one factor is determinative. Here are just a few of the many factors: The intent of the parties and the adherence to formalities, the identity of the creditors and shareholders, the ability of the corporation to obtain funds from outside sources, the thinness of the capital structure, and the risk involved. Additionally, new regulations have been issued that can automatically recast related party debt as stock when the debt is issued by a U.S. corporation to a foreign corporation that is part of the same "expanded group" in a distribution, in exchange for stock, or in exchange for assets in a "reorganisation." Debt issued close in time to one of these transactions may also be treated as equity if it is deemed to "fund" the transaction.

Transfer pricing: The Internal Revenue Service has the ability under Section 482 to adjust the interest rate on loans between related parties to reflect an "arm's-length" standard. Interest owed to related foreign persons: In general, interest owed to a related foreign person that is otherwise deductible may not be deducted until it is paid.

AHYDO: If an instrument is classified as an applicable high-yield discount obligation (AHYDO), a portion of the interest deduction is deferred until paid and a portion may be permanently disallowed and treated as a nondeductible dividend. In general, debt issued by a corporation may constitute AHYDO if it: Has a maturity date of more than five years, has a yield to maturity of five percentage points over the "applicable federal rate" (as published by the IRS), and has "significant original issue discount" (an excess of original issue discount accruals over actual interest payments).

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?

The primary strategy to push down debt is to form a domestic holding company which, in turn, forms a transitory merger subsidiary used to affect the acquisition. Upon the consummation of the transaction, the merger subsidiary is merged into the target and the proceeds are disbursed to the selling shareholders in exchange for their stock. Financing is arranged for the merger subsidiary, which is subsequently assumed by the target as the successor to the merger. Financing may come directly from third parties or internally through back-to-back loans (subject to conduit financing rules). A US Bidco can also be formed and capitalised with third party or related party debt to acquire the target and then file a consolidated U.S. federal income tax return with the target. As not all states allow consolidated income tax filings, state tax implications must be considered. Other typical strategies to push-down debt, including related party sales or post-acquisition financing, are no longer viable due to the new regulations issued under Section 385.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

There are no tax incentives for equity financing in the United States. Instead, there are tax advantages to debt financing, including the deductibility of interest and ability to distribute cash tax free as a repayment of principal.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

Prior to tax reform, a net operating loss could be carried back to the two years preceding the loss year and then forward to the subsequent 20 years to offset the taxable income in those years. Net operating losses generated in 2018 and forward cannot be carried back, but may be carried forward indefinitely. Net operating losses that arise after 31 December 2017 cannot offset more than 80% of taxable income in the year to which they are carried.

Where the stock of a corporation is acquired, any net operating losses remain intact and may be used by the acquiring corporation, subject to certain change in control limitations. The most common limitation is imposed by Section 382. Here, where a corporation undergoes an "ownership change," generally defined as a more than 50 percentage point change in its ownership over a three-year period, U.S. tax rules impose an annual limitation, called a "Section 382 limitation," on the amount of taxable income that can be offset by any pre-change net operating loss carryovers and built-in losses.

This limitation equals the product of the value of the loss corporation's equity immediately before the ownership change and the applicable federal long-term tax-exempt interest rate. The limit may be adjusted in certain circumstances which commonly include stuffing transactions and corporate contractions. If the Section 382 limitation for a post change year exceeds the taxable income that is offset by pre-change loss, the Section 382 limitation for the next post-change year is increased by the amount of such excess. Special rules also apply for corporations with built-in gain (or loss) and those in bankruptcy.

10. RE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Anti-churning: The anti-churning rules are designed to prevent taxpayers from converting intangibles that existed on or before 10 August 1993, and for which amortisation was not allowed, to amortisable intangibles. The rules apply if the historical shareholders of a business retain an interest of twenty percent or more in a company post-transaction, and the Company commenced operations (and non-amortisable intangibles/ goodwill existed) prior to 10 August 1993. Any goodwill and the related amortisation deductions generated by a transaction would be disallowed if the goodwill was not amortisable under the law in effect prior to 10 August 1993.

Deferred Revenue: Generally, advance payments are taxed upon receipt, though there are certain exceptions permitting limited deferral. Under the "Deferral Method," income from an advance payment is recognised in the tax year of receipt to the extent that the taxpayer recognises the payment as revenue in the taxpayer's financial statements for that tax year, with the "deferred" portion of the payment being recognised in the following tax year, regardless of when it is recognised for book purposes.

State Tax Diligence: Companies are subject to income and non-income taxes in a state if they have sufficient nexus in that state. There are different types of contact that can generate nexus including economic, clickthrough, affiliate, and physical presence. Where a company has nexus across multiple states, it is important to understand the company's methodology for apportioning activity between states as that determines the amount of income that should be taxed in each state.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

The sale of stock in a corporation generally does not result in transfer tax. However, where the corporation owns real estate, some states may impose a "controlling interest" transfer tax on the underlying real estate of the acquired entity in the taxing state.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Generally, whether acquisition costs are deductible or must be capitalised hinges principally on the point in time at which the costs are incurred. The tax treatment of expenditures incurred in business acquisitions and dispositions is based on a fact-intensive determination of the nature and reason for such expenses.

The general rule requires the taxpayer to capitalise all costs that facilitate a transaction. In general, amounts paid in the process of investigating or otherwise pursuing a transaction are deductible only if the amount relates to activities performed before the "bright line date," generally the date the parties sign a letter of intent or otherwise commit to the transaction.

Costs that are inherently facilitative of the transaction are required to be capitalised regardless of whether they are incurred before or after the bright line date. Costs that are typically classified as inherently facilitative may include costs associated with appraisals, fairness opinions, structuring the transaction, preparation and review of transaction documents, obtaining shareholder approval and property conveyance costs (i.e., transfer taxes and title registration costs).

In addition, taxpayers can elect to treat any success based fees (e.g., banker fees) in accordance with Rev. Proc. 2011-29, which provides a taxpayer with a safe harbor that generally allows for the deduction of 70% of the success based fee (though certain other limitations may apply) and capitalisation of the other 30%.

A certain portion of the costs incurred in a transaction may relate to debt issuance. In general, the costs associated with a borrowing are required to be capitalised and amortised over the term of the debt. When a debt obligation is satisfied, retired, or exchanged the taxpayer may deduct the unamortised debt issuance costs.

Determining the deductibility of transaction costs is a very fact-intensive analysis, especially when dealing with multinational target companies where the transaction costs must be allocated across the different entities and jurisdictions involved. When transaction costs are expected to be significant, we recommend undertaking a formal transaction cost analysis, as this area is consistently challenged by the IRS.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

There is no VAT, or similar tax, imposed on transaction costs incurred in the U.S.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

Choice of entity: Foreign investors may choose from several types of entities to invest in the U.S. Partnerships and Limited Liability Companies (LLCs), are generally not subject to income tax but instead are treated as "flowthrough" entities whose income is taxed to their owners. Corporations are subject to tax on their income and their shareholders are subject to tax when the income is distributed to them. Flow-through entities provide the advantage of a single layer of tax (as opposed to the double layer of tax in the corporate regime) and provide a seller a more tax efficient means to convey a step-up in the basis of the underlying assets to a buyer. Importantly, flow-through entities subject their owners to U.S. income tax and filing requirements and, for this reason, many foreign investors prefer to invest in the U.S. through a blocker corporation. Moreover, distributions from flow-through entities may attract branch profits tax, which is a surrogate for the withholding tax that would be imposed on a dividend if the entity were a corporation.

Capitalisation: Investors may capitalise their investment with debt, equity, or a combination of both. Debt may be from an external source or related party. The choice between debt and equity may influence a company's taxable income and its ability to repatriate earnings efficiently. A key differentiating feature is that interest is deductible (subject to certain limitations) whereas dividends are not. Furthermore, repayment of debt is not subject to withholding whereas redemption of equity may be treated as a dividend subject to withholding.

Treaty protection: The U.S. has an extensive treaty network. The ability to choose a favorable jurisdiction from which to invest should be a significant consideration. However, nearly all U.S. treaties contain limitation on benefits provisions that restrict treaty shopping. Inversions: The Inversion rules need to be considered when a U.S. corporation is acquired by a foreign company. These rules can impact the U.S. tax treatment of the foreign acquirer, as well as the recognition of gain or loss related to the transaction. Exit considerations: Capital gains recognised by foreign persons are not generally taxed in the U.S. However, capital gains recognised on the sale of an interest in a partnership engaged in a U.S. trade or business are generally subject to tax, as are gains on United States Real Property Holding Corporations. Other considerations: Where a foreign buyer with a U.S. subsidiary is acquiring a foreign target, consideration should be given to causing the target to be acquired by the foreign parent rather than the subsidiary so as not to create an inefficient "sandwich" structure.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

A group may be able to reorganise and simplify tax-neutrally after an acquisition through internal tax-free reorganisations, liquidations, mergers, and related transactions. State tax consequences of such transactions should always be considered, as state tax consequences can vary from federal treatment, especially with regard to transactions between members of a U.S. federal consolidated group. Additionally, care should be taken with regard to the impacts of the "step-transaction" doctrine, which courts often apply to integrate a series of otherwise separate steps, resulting in unanticipated and potentially unfavorable tax consequences. Recent U.S. legislation also codified the "economic substance" doctrine. In general, the doctrine denies tax benefits arising from transactions that do not result in a meaningful change to the taxpayer's economic position other than a purported reduction in Federal income tax. If a transaction is found to lack economic substance, a strict liability penalty between 20% - 40% of the underpayment of tax attributable to the disallowance of the claimed tax benefit applies.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

The Foreign Investment in Real Property Tax Act (FIRPTA) taxes nonresident aliens and foreign corporations on disposition of a U.S. Real Property Interest (USRPI), including disposition of an interest in a U.S. Real Property Holding Corporation (USRPHC). A withholding tax of 15% of the amount realised by the foreign transferor must generally be withheld by the seller of a USRPI to ensure that an appropriate amount of tax is paid upon the disposition (higher withholding rates can apply in certain circumstances). The buyer can choose to file a U.S. tax return and report and pay tax on the actual gain realised at standard U.S. tax rates, in which even the withholding tax is creditable as a prepayment of the final tax. A withholding tax also applies to non-resident aliens and foreign corporations that are partners, trust beneficiaries, or estate beneficiaries on the distribution of profits attributable to the sale of a USRPI. In general, a domestic corporation is a USRPHC if the market value of its USRPI constitutes 50% or more of its value. Recent amendments provide exemptions for sales of shares in certain investment entities, and sales by qualified foreign pension funds.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

U.S. corporations may elect to consolidate their earnings and losses for federal income tax purposes and file consolidated returns where there is an "affiliated group" of entities which are at least 80% related (by vote and value). Losses of one member of a consolidated group can generally be used to offset losses of another member of the consolidated group. A consolidated group can also simplify tax preparation as the number of income tax returns to be filed is reduced. Consolidated (or combined) filings are required in certain states if related entities satisfy certain ownership requirements (ownership requirements vary by state) and are sufficiently interdependent. Other states may permit consolidated (or combined) filings where the entities in the group each have sufficient nexus or connections with that state and make an election. A minority of states do not allow for any form of consolidated (or combined) income tax reporting.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

No. However, tax credits are available for domestic R&D expenses. For tax years beginning after December 31, 2021, research and experimental costs, including software development costs paid within the United States, cannot be deducted and must be capitalized and amortized over 5 years. Research and experimental costs incurred outside of the United States must also be capitalised, but amortized over 15 years.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

Cutbound transfers of property are generally taxable. When the property transferred is intangible, special rules may apply to treat the payment as a licence that generates royalty income.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

Capital gains recognised by individuals are taxed at a preferential rate (currently a 15 - 20% federal rate for the sale of assets held for longer than a year vs. a maximum 39.6% federal rate for "ordinary" type income), while those recognised by corporations are taxed at the corporate rate (currently 21% federal rate). Capital gains are also subject to state income taxes with rates ranging from 0% to approximately 10%. Capital gains recognised by foreign persons are not generally taxed in the U.S. However, capital gains recognised on the sale of an interest in a partnership that is engaged in a U.S. trade or business are generally subject to U.S. tax. U.S. individuals, estates, and trusts may also be subject to the 3.8% net investment income tax. The U.S. does not have a participation exemption regime. In addition, foreign persons are subject to tax on gains from the disposition of a U.S. Real Property Interest under the FIRPTA regime.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS ARE REINVESTED?

No. However, deferral may be available if sellers are "rolling over" part of their interest in the business.

22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

The U.S. imposes federal income tax on a residence basis, so any holding or finance company established in the U.S. will be subject to corporate level tax in the U.S., regardless of its substance. The eligibility of a U.S. holding company for benefits under a treaty, however, may be dependent upon having either sufficient business activities in the United States or U.S. shareholders.

23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

Mergers and spin-offs can be taxable or non-taxable depending on how they are structured and the nature of the consideration paid. For a merger or spin-off to be tax-free, a substantial part of the proprietary interest in the target must be preserved through the proprietary interest in the acquirer, the historical business of the target or a significant part of its historical assets must be used in a continuing business, and the merger cannot have as its principal purpose the evasion or avoidance of federal income tax. Reverse subsidiary mergers and forward subsidiary mergers may also be non-taxable provided these and other requirements are satisfied.

Tax-free spin-offs are possible, though subject to complex tax requirements. A post-spin merger of the transferor corporation will result in a taxable transaction. The rules for spin-offs in practice require a great deal of planning to execute. If a spin-off fails to meet the requirements of a non-taxable transaction, then it may be treated as a taxable dividend.

MANAGEMENT INCENTIVES

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

There are multiple ways to structure incentive plans for management. The two most common are stock options and profits interests. Companies can also implement cash-based annual incentive plans (AIP), tied to service and execution of the annual budget; issue stock appreciation rights; issue time-based restricted stock/units or performance shares (units)); or payout additional cash compensation based on performance over a multi-year period.

When stock options (as well as restricted stock/units or performance shares (units)) are issued generally there is no taxable event for the issuer or the recipient. When the options are exercised, the difference between the fair value of the shares at the time of exercise and issuance of the stock option is deductible to the issuer as compensation. The holder of the stock option is subject to ordinary income tax on the same amount. Stock options are often exercised and sold (or simply cashed out) at the closing of a transaction, triggering ordinary income tax to the option holders, and a corresponding deduction to the issuer.

Holders of profits interests in partnerships may receive annual allocations of profit or loss from the issuing partnership or a portion of exit proceeds on the sale of the partnership or its assets, once predetermined performance hurdles have been satisfied. This structure can allow profits interests holders to recognise capital gains on exit proceeds in a transaction, rather than ordinary income, which is generally the result in a stock option structure, which would be taxed at higher rates. The partnership, however, does not get a deduction, as could be the case with a stock option structure. Profits interests are commonly used in operating partnerships, as well as where the only asset of the issuing partnership is the stock of a corporate operating subsidiary.

Stock appreciation rights and performance bonuses are taxed as compensation to management as ordinary income and deductible to the company.

Additional points to consider when structuring management incentive plans are as follows:

- Executives may receive accelerated rights to cash incentives, or the vesting of equity compensation because of a transaction. These may be “parachute payments,” subjecting the executives to an excise tax, and the payments are not deductible by the seller/target under Section 280G
- For publicly traded companies, compensation greater than USD 1 million paid to executives named in the company’s proxy statement is not deductible unless based on pre-established performance goals under Section 162(m). A discretionary payment of incentive compensation in response to an acquisition will likely not be consistent with the original performance goals, and thus some planning or adjustment may be required to preserve the deduction
- Deferred compensation, including deferred incentive compensation, is regulated under Section 409A. Among the regulatory details of that section are specific definitions of a change in control and separation from service that may determine the right and timing to payment, and a rule that requires specified employees to defer receipt of compensation for six months following a separation from service. Target equity awards may be converted into buyer’s equity, the method by which this is accomplished may be regulated under Section 409A. Failure to comply with Section 409A can result in early income inclusion, penalties and interest.

FOR MORE INFORMATION CONTACT:

Adam Benson
Tel: +1 212 763 9586
E-mail: abenson@alvarezandmarsal.com

Jim Stanley
+1 415 490 2125
jstanley@alvarezandmarsal.com

Ernesto R. Perez
Tel: +1 305 704 6720
E-mail: eperez@alvarezandmarsal.com