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IRS Releases Guidance on LIBOR Transition

The IRS, in Revenue Procedure 2020-44, provides guidance on the market's transition from the London Interbank Offered Rate (LIBOR) and other rates to alternative reference rates. The Revenue Procedure states that (i) certain modifications to a contract with terms referencing an IBOR (defined below) will not be treated as an exchange of property for other property differing materially in kind or extent for purposes of Section 1.1001-1(a) of the Treasury Regulations; and (ii) such modifications will not be treated as a legging out of an integrated transaction, a termination of a qualified hedge, or as a disposition or termination of either leg of a hedging transaction. (Section references are to the Internal Revenue Code of 1986, as amended and the related Treasury Regulations, as the context requires.)

On July 27, 2017, the U.K. Financial Conduct Authority, the U.K. regulator tasked with overseeing the LIBOR, announced that all currency and term variants of LIBOR, including U.S.-dollar LIBOR (USD LIBOR), may be phased out after the end of 2021. These interbank offered rates (IBORs) are frequently referred to in the terms of debt instruments and non-debt contracts. The IRS has issued proposed reliance regulations (REG-118784-18 – see our prior coverage here) that provide guidance on the tax consequences of the transition to the use of reference rates other than IBORs in debt instruments and non-debt contracts.

The Alternative Reference Rates Committee (ARRC) was charged with finding an alternative reference rate to USD LIBOR and facilitating its implementation. To support the transition from USD LIBOR, the ARRC published recommended fallback language, to be included in the terms of certain products, which describes the circumstances under which references to the current benchmark rate are replaced (ARRC Fallbacks). The ARRC has also worked with the International Swaps and Derivatives Association (ISDA) to ensure that the contractual fallback provisions in derivatives contracts are sufficiently robust to prevent serious market disruptions if LIBOR is permanently discontinued. ISDA has issued guidance (most recently, the ISDA Protocol) related to relevant terms and definitions intended to facilitate the inclusion of fallback provisions for IBORs in derivative transactions (ISDA Fallbacks).

In response to several comment letters written by ARRC, the IRS and Treasury Department issued Revenue Procedure 2020-44 (which is interim guidance meant to address issues prior to the finalization of the proposed reliance regulations discussed above) to support the adoption of the ARRC Fallbacks and ISDA Fallbacks. Revenue Procedure 2020-44 applies to any contract (e.g., a derivative contract, a debt instrument, stock, or an insurance contract, etc.) with terms that reference an IBOR and that are modified to incorporate (a) an ISDA Fallback, regardless of whether that modification results from adherence to the ISDA Protocol or a bilateral agreement between the parties to the contract, (b) an ARRC Fallback, or (c) the terms of either an ARRC Fallback or an ISDA Fallback with certain deviations. The Revenue Procedure states that:

1. The above modifications to such a contract are not treated as the exchange of property for other property differing materially in kind or extent for purposes of Section 1.1001-1(a).

1. If such a contract is one leg of a transaction integrated under Sections 1.1275-6 or 1.988-5(a), the modification of that contract is not treated as legging out of the integrated transaction under Sections 1.1275-6 or 1.988-5(a).
1. If such a contract is integrated under Section 1.148-4(h), the modification is not treated as terminating the qualified hedge under Section 1.148-4(h).
1. If such a contract is part of a hedging transaction under Section 1.446-4, the modification is not treated as a disposition or termination of either leg of the transaction under Section 1.446-4.

Lastly, the Revenue Procedure also provides guidance for contracts that are contemporaneously modified as described above and not modified in a manner as described above. Revenue Procedure 2020-44 is effective for modifications to contracts occurring on or after Oct. 9, 2020, and before Jan. 1, 2023, but may be relied on for modifications to contracts occurring before Oct. 9, 2020.

IRS Issues Final Regulations on Consolidation Net Operating Losses

The IRS has issued final regulations (TD 9927) implementing the application of recent changes to the Section 172 net operating loss (NOL) deduction to consolidated groups. Section 172(a)(2) was amended by the 2017 Tax Cuts and Jobs Act and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide for an 80% limitation on the NOL deduction. These regulations provide guidance relating to the implementation of the above changes to Section 172(a), the absorption of consolidated net operating loss (CNOL) carryovers and carrybacks, and also update regulations applicable to consolidated groups that include both life insurance companies and other companies to reflect statutory changes.

SBA and Treasury Clarify Certain PPP Requirements

The Small Business Administration (SBA) and the U.S. Department of Treasury have provided additional information regarding the Paycheck Protection Program (PPP). The PPP was established by the CARES Act (as modified by the Paycheck Protection Program Flexibility Act of 2020) and authorized the SBA to issue forgivable loans to qualified businesses to cover payroll expenses and certain other expenses during the COVID-19 crisis. SBA and Treasury announced the release of a streamlined loan forgiveness application for loans of $50,000 or less. Additionally, the SBA and Treasury have updated the PPP Loan Forgiveness FAQs. Borrowers are permitted to defer payments of principal, interest, and fees to 10 months after the last day of the covered period (the earlier of 24 weeks or Dec. 31, 2020). The SBA began approving PPP forgiveness applications and remitting forgiveness payments to PPP lenders on Oct. 2, 2020. The FAQs are updated to provide that the deadline for borrowers to apply for forgiveness of a loan is not Oct. 31, 2020; rather, the borrower must apply for forgiveness no later than 10 months after the last day of the borrower's loan forgiveness covered period. The FAQs explain that the date, Oct. 31, 2020, is on the form for administrative purposes and will be updated when a new form is approved.

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IRS Temporarily Allows Fax Filing of Form 8886

The IRS has announced that it will allow taxpayers to temporarily fax in the Office of Tax Shelter Analysis (OTSA) copy of the initial year filing of Form 8886, Reportable Transaction Disclosure Statement, until further notice. Taxpayers also must continue to file Form 8886 with their tax return.