To Our Clients and Friends

Memorandum

Common M&A Transactions Require the Filing of a Transfer Agreement by October 9th to Avoid Acceleration of Section 965(h) Installment Liability

Section 965(a), which was added to the Code in late 2017 as part of the Tax Cuts and Jobs Act, generally imposed a deemed repatriation tax on a U.S. shareholder's accumulated earnings and profits of a "deferred foreign income corporation" (the "Transition Tax"). Under Section 965(h), taxpayers were eligible to make an election to defer payment of the Transition Tax by utilizing an eight-year installment plan (the "Installment Election").

Section 965(h)(3) provides that if a taxpayer makes an Installment Election and is subsequently liquidated, substantially all of its assets are sold, or there is a cessation of the business of the taxpayer (or any similar circumstance), the remaining unpaid installments become due on the date of such event (an "Acceleration Event"). Proposed regulations that were published in the Federal Register on August 9, 2018 (the "Proposed Regulations") expand the list of Acceleration Events to include two cases that are common in M&A transactions. One case is where a corporation that has an Installment Election in place and was not a member of a consolidated group joins a consolidated group, which often happens when a corporation is acquired. Prop. Treas. Reg. § 1.965-7(b)(3)(ii)(E). The second case is where a consolidated group that has an Installment Election in place ceases to exist, which generally happens when a consolidated group is acquired by another corporation or consolidated group. Prop. Treas. Reg. § 1.965-7(b)(3)(ii)(F). Notably, these cases include situations in which the purchasing corporation or consolidated group was newly formed in connection with the acquisition.

In order to prevent the acceleration of the tax liability deferred under the Installment Election, the transferor (which in these cases would be the target or old consolidated group, as the case may be) and transferee (which in these cases would be the surviving consolidated group) must sign an agreement that the transferee will assume the liability for any unpaid installment payments (the "Transfer Agreement"). Prop. Treas. Reg. § 1.965-7(b)(3)(iii)(B)(4). The Transfer Agreement must generally be filed with the IRS within 30 days of the Acceleration Event. Prop. Treas. Reg. § 1.965-7(b)(3)(iii)(B)(2)(i). There is a transition rule that provides that for Acceleration Events that occurred prior to September 10, 2018, the Transfer Agreement must be filed by October 9, 2018. Prop. Treas. Reg. § 1.965-7(b)(3)(iii)(B)(2)(ii). (Note that, pursuant to IRS Notice 2018-78, § 4, taxpayers and businesses that were affected by Hurricane Florence have until January 31, 2019 to file their Transfer Agreements.)

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Taxpayers who have closed on acquisitions of companies with Section 965(h) Installment Elections should examine whether they need to file a Transfer Agreement to avoid triggering immediate taxation. Absent further guidance from Treasury, the due date to file the agreement (for deals that closed prior to September 10, 2018) is October 9, 2018. Section 9100 relief is not available. Prop. Treas. Reg. § 1.965-7(b)(iii)(B)(2)(i).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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