Agenda

• Tax Reform Developments (domestic)
• Primer on Merger & Acquisition Structures and Considerations
• Tax Treatment of Merger Costs
• Questions

Highlights and Developments related to TCJA
TCJA - Generally

• Corporations were afforded a 40% reduction to the federal tax rate (21%) along with many other business-friendly provisions.

• Due to the swiftness in which the bill moved through Congress, we expected
  • Significant technical corrections (has not occurred), and
  • Voluminous interpretation by Treasury (some released).

Alternative Minimum Tax Changes

• New law effectively repeals the AMT by reducing the AMT rate from 20% to 0% for taxable years beginning after 12/31/2017

• AMT credits carried forward from prior years can be used to offset 100% of the post-2017 tax liability

• To the extent the available AMT credit for a given year exceeds that year’s tax liability, the AMT credit will become refundable
Alternative Minimum Tax Changes

• Given that AMT credit carryforward realization no longer requires future taxable income, the company could consider –
  • Releasing any valuation allowances against AMT credit deferred tax assets that existed at 12/22/2017
  • Reclassifying these credits on the balance sheet as tax receivables, rather than deferred tax assets
• This provides significant improvement to the treatment of AMT credit carryforwards in the regulatory capital calculations

Tax Depreciation Changes

• 100% direct expensing for qualified assets
• Is an enhancement of bonus depreciation
• Property can be new or used
• Note - most states do not follow the federal bonus depreciation rules

<table>
<thead>
<tr>
<th>Placed-in Service Date</th>
<th>Bonus Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>9/28/2017 - 2022</td>
<td>100%</td>
</tr>
<tr>
<td>2023</td>
<td>80%</td>
</tr>
<tr>
<td>2024</td>
<td>60%</td>
</tr>
<tr>
<td>2025</td>
<td>40%</td>
</tr>
<tr>
<td>2026</td>
<td>20%</td>
</tr>
<tr>
<td>After 2026</td>
<td>0%</td>
</tr>
</tbody>
</table>
Net Operating Loss Changes

• For losses generated in taxable years ending after 12/31/2017:
  • New law eliminates the ability to carry back net operating losses (“NOLs”) to prior years
  • Unused NOLs are carried forward indefinitely

• For losses generated in taxable years beginning after 12/31/2017:
  • NOLs can only offset 80% of taxable income in any given year

IRC §162(m) Limitation

• Longstanding provision applicable to public companies that limits the annual deduction for compensation paid to certain executive officers to $1 million

• New law expands the scope and application of this limitation by:
  • Expanding the number of executives and companies to which the limitation applies; and
  • Eliminating certain exceptions to the limitation that applied under prior law
IRC §162(m) Limitation

• Definition of “Covered Employee”

• Includes the PEO, the PFO and the three most highly-compensated employees other than these two individuals, provided the compensation of these employees is required to be reported to shareholders under SEC rules

• Applies a “once a covered employee, always a covered employee” rule beginning in 2017

• This expansion may significantly increase the number of covered employees over time compared to prior law

• Removal of exception for performance-based compensation

• The new law offers no exclusion for performance-based compensation or commissions

• Once fully phased-in, the new law (for many) will effectively be a matter of disallowing the deduction for W-2 compensation in excess of $1 million

• Stock-based compensation, performance-based cash bonus, deferred compensation payouts, etc. will all be subject to the annual limitation, even in retirement
**IRC §162(m) Limitation**

- Grandfathered compensation plans
- Prior law continues to apply to payments under a written binding plan that was in effect on 11/2/2017 and was not materially modified on or after that date
- On 8/21/2018, the IRS issued Notice 2018-68 that addresses some of these questions

**FDIC Premium Deduction Phase-Out – IRC §162(r)**

- Phased out for banks >$10 billion in total assets
- Lost deduction formula:
  \[
  \text{Total consolidated assets at year end >$10 billion} \times \frac{40 \text{ billion}}{} = \text{FDIC premiums otherwise deductible for the year}
  \]
- Deduction is entirely lost when year-end consolidated total assets equals or exceeds $50 billion
- FICO assessments appear to fall outside the scope of the deduction limitation
Meals & Entertainment Expenses

• New law denies any deduction for entertainment expenses (formerly subject to 50% limitation)

• Some of the rules surrounding meals are confusing and require further Treasury guidance

• IRS Notice 2018-76 clarifies that food and drink at/during an entertainment event (e.g. a ballgame) is still 50% deductible, provided the taxpayer is present at their furnishing to a current or potential customer, client, consultant or similar business contact; the cost of the food and drink is separately invoiced or separately stated on an invoice; and the cost is not lavish or extravagant

Meals & Entertainment Expenses

• Based upon current law and recent IRS pronouncements (pending proposed regulations):

<table>
<thead>
<tr>
<th>Description</th>
<th>Deductibility</th>
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</thead>
<tbody>
<tr>
<td>Meals with clients, customers or prospects with substantial business</td>
<td>50% deductible (unchanged)</td>
</tr>
<tr>
<td>discussions</td>
<td></td>
</tr>
<tr>
<td>Meals with clients, customers or prospects at an entertainment event /</td>
<td>50% deductible if separately invoiced</td>
</tr>
<tr>
<td>facility</td>
<td>(unchanged)</td>
</tr>
<tr>
<td>On-premise meals provided for the convenience of the employer (i.e., lunch</td>
<td>50% deductible NEW (was formerly 100%</td>
</tr>
<tr>
<td>and dinner provided to employees while working)</td>
<td>deductible)</td>
</tr>
<tr>
<td>Meal reimbursements to employees while traveling for business purposes</td>
<td>50% deductible (unchanged)</td>
</tr>
<tr>
<td>Holiday party or similar social events for employees</td>
<td>100% deductible (unchanged)</td>
</tr>
</tbody>
</table>
BOLI Transfers / Reportable Policy Sales – IRC §101(a)(3)

• New law applicable to transfer of BOLI policies may have unintended consequences for bank mergers and acquisitions

• BOLI policies “transferred for value” lose their tax-exempt status upon transfer and produce taxable death benefits, unless an exception applies

• This treatment is not new, but tax law changes seek to apply these rules to newly-coined “reportable policy sales,” including transfers of equity interests in entities owning the policies via tax-free mergers and stock acquisitions (i.e., carryover tax basis transactions)

BOLI Transfers / Reportable Policy Sales – IRC §101(a)(3)

• Exceptions to reportable policy sale treatment apply if the insured individuals have a substantial family, business or financial relationship with the acquiror
  
  • These terms are undefined, but it is presumed that an employee, director or substantial shareholder would meet these requirements

• If applied as written, many BOLI policies owned by an acquired target would convert into taxable investments and be subject to certain information reporting requirements
BOLI Transfers / Reportable Policy Sales – IRC §101(a)(3)

- The application of the new rule to tax-free mergers and stock acquisitions appears to be inadvertent and is the subject of intense lobbying efforts to correct.
- IRS notice 2018-41 announces that Treasury intends to issue detailed regulations on the application of this new rule and suspends the related information reporting requirement until these regulations are issued.

Miscellaneous Other Changes

- Bond credits repealed.
- The dividends received deduction is reduced –
  - From 70% to 50%, if corporation owns less than 20% of the dividend payer
  - From 80% to 65% if corporation owns 20% - 79% of the dividend payer
- Disallows any deduction for expenses paid or incurred for:
  - De minimis fringe benefits provided to employees that are primarily personal in nature
  - Qualified parking and transportation fringe benefits (IRS Notice 2018-99)
S Corporation Bank Developments

• Many developments relative to the 20% pass-through deduction for qualified business income (Sect. 199A)

• Final Treasury Regulations and IRS Notice 2019-17 issued 1/18/2019
  - Confirms core banking activities qualify
  - Further defines Specified Service Trade or Business (SSTB)
    - Wealth management and trust advisory services are SSTB
    - Excludes sales of originated loans from “dealing in securities”
    - Clarifies de minimis exclusion for some SSTB income

• Planning opportunities will be considered by many S corp banks to address SSTBs
## C Corporation vs. S Corporation

<table>
<thead>
<tr>
<th></th>
<th>C Corp</th>
<th>S Corp</th>
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</thead>
<tbody>
<tr>
<td>Taxable Income</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Tax</td>
<td>(21)</td>
<td>(33)</td>
</tr>
<tr>
<td>Post-tax cash available (assume dividend)</td>
<td>79</td>
<td>67</td>
</tr>
<tr>
<td>Tax on dividend</td>
<td>(19)</td>
<td>0</td>
</tr>
<tr>
<td>Net cash to shareholders</td>
<td>60</td>
<td>67</td>
</tr>
<tr>
<td>Effective tax rate</td>
<td>40%</td>
<td>33%</td>
</tr>
</tbody>
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SCOTUS Ruling in *South Dakota v. Wayfair*

- Physical presence no longer a pre-requisite to compel out-of-state retailers to collect sales tax on sales to residents of a particular state
- Overturns longstanding precedent set by previous SCOTUS decision (*Quill*)
  - Prior decision ruled to be outdated based upon the evolution of e-commerce
- Has far-reaching implications for multi-state retailers on the sales tax side
- Sales tax concerns for banks with multi-state customers may exist to the extent any particular state subjects financial transactions to sales tax

However, the potential impact of the ruling on state income tax nexus may pose a significant concern for banks with multi-state customers

- Strengthens state assertions of economic nexus to tax out-of-state banks with in-state loan customers
- Banks may need to re-evaluate ASC 740-10 ("FIN 48") state income tax exposure
- In Q2, Wells Fargo announced a $481 million charge to income tax expense "mostly related to state income taxes driven by the recent U.S. Supreme Court decision in *South Dakota v. Wayfair*"
What tax benefits does the buyer seek to acquire?

• The answer depends on several considerations:

  • 1) Is the target a healthy institution or has it had chronic financial troubles that is causing it to seek a buyer?

  • 2) Is a premium being paid for the target, or is the target being acquired at a discount (the relevant measurement is to tax book value, rather than GAAP book value)?

  • 3) Does the target have accumulated tax losses and credit carryforwards that the buyer could use to offset its post-acquisition tax liability?

  • 4) Does the target have significant built-in losses that the buyer can use to offset its post-acquisition tax liability?
Can Buyer Acquire Target’s Tax Benefits?

• Yes, provided the acquisition is properly structured

• Generally requires:
  • A tax-free reorganization or merger transaction with the purchase consideration consisting of the requisite percent of Buyer stock; OR
  • A taxable purchase of Target stock for cash and/or other consideration

• Buyer succeeds to these Target tax benefits regardless of whether they are recorded on the GAAP books of Target (they may be offset by a valuation allowance)

Are There Limitations Placed on the Use of These Benefits?

• Potentially, depending on the size of the acquired benefits, the purchase price paid for Target, and the remaining life of any tax loss or credit carryforwards acquired from Target

• IRC §382 applies an annual limitation on Buyer’s use of Target tax benefits when there has been an ownership change with respect to Target
Common Acquisition Structures

• Most acquisitions of C-corporation banks are structured as tax-free reorganizations

• However, certain acquisitions of non-bank entities (i.e. insurance agencies) and S-corporation banks are often structured as taxable asset purchases

• Understanding the tax implications of the various acquisition structures common to the banking industry and the resulting book-tax differences in the treatment of the acquisition premium is imperative

Treatment of Acquisition Premium

• For purposes of this discussion, "acquisition premium" refers to the excess of the purchase price paid for an intangible asset (i.e. goodwill, core deposit intangible, etc.) over its tax basis

• The tax treatment of acquisition premium is a significant issue for banks, given the level of acquisition activity within the financial services industry and the extent of purchase consideration allocated to intangible value in these transactions

• A fundamental understanding of which acquisition structures give rise to amortizable premium basis (and which structures do not) is imperative
**Treatment of Acquisition Premium**

- In an acquisition scenario, §197 generally provides the only opportunity for the acquirer to amortize its acquisition premium.

- §197 provides for 15 year, straight-line amortization of any “amortizable section 197 intangible.”

- For a bank, the typical amortizable intangibles are goodwill and CDI.

- Only section 197 intangibles created in connection with a transaction involving the acquisition of assets constituting a trade or business or substantial portion thereof can be amortized.

**Healthy Target Acquired at a Premium**

- Probably little or no Target tax loss or credit carryforwards to acquire.

- Buyer would likely benefit from the ability to amortize its purchase premium for tax purposes (straight-line over 15 years per IRC section 197).

- Therefore, buyer will seek a transaction structure that enables it to amortize the purchase premium.

- Available structures:
  - 1) A direct (and taxable) purchase of the target’s assets (and typically the assumption of its liabilities); or
  - 2) A direct (and taxable) purchase of the target’s stock followed by an IRC section 338 election (a tax election to treat a stock purchase as if it was an asset purchase).
Taxable Asset Purchase

- Refers simply to the acquisition of corporate assets in a transaction that is taxable at the corporate level to the seller
- Seller recognizes gain or loss for the difference between the sales proceeds (including liabilities assumed by the buyer) and the tax basis of assets sold
- Buyer receives full tax basis in the value of assets acquired and can amortize any premium paid under §197 (15 yr. S/L)
Taxable Asset Purchase

- If the seller is a C-corporation and distributes the after-tax proceeds of the sold assets to its shareholders, the shareholders will be taxed on this distribution (the shareholders receive no step up in basis in their stock as a result of the corporate-level gain)

- Due to this double taxation, a taxable asset sale is seldom used in a C-corporation bank acquisition

- This transaction is more common to small corporate acquisitions (i.e. insurance agencies) and branch purchases

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Taxable Asset Purchase

- However, the taxable asset purchase is a very common structure in acquisitions of S-corporation banks

- This is because the S-corporation shareholders do receive a step up in the basis of their stock investment as a result of the asset sale, so the gain on the sale of the company is effectively only taxed once (assuming BIG tax does not apply)

- Likewise, the buyer enjoys a full tax basis in the value of the assets acquired with the ability to amortize the premium under §197
Taxable Asset Purchase

• All of the FDIC-assisted acquisitions of failed institutions in the current marketplace are structured as taxable asset purchases

• The presence of the FDIC assistance (often in the form of a cash payment or a loss-guarantee to the buyer) causes the application of IRC §597

• The application of §597 may cause the buyer’s purchase price allocation for tax purposes to differ from the book allocation, or may cause the recognition of taxable income to the buyer, or both

Tax-free Reorganizations

• Often referred to as §368 transaction or structure

• Several fundamental requirements must be satisfied for all tax-free acquisitions

• Most bank mergers meet all requirements

• One item that needs particular attention is continuity of interest (“COI”)
Impact of a Tax-free Reorganization

• No gain or loss is recognized by the target corporation

• Target shareholders recognize gain only to the extent of “boot” (property other than acquiror stock) received in the transaction

• The tax basis of target’s assets and liabilities carries over to the acquiring corporation - Acquiror has no tax basis in the financial accounting premium or purchase accounting adjustments (no tax amortization of these amounts is available)

Continuity of Interest (“COI”)

• Requires that the target shareholders retain some level of proprietary interest in the acquiring / surviving corporation

• Measured by reference to the amount of stock of the acquiring corporation (or its immediate parent) issued as consideration in the transaction

• For typical bank merger structures, the following COI is required:
  • 40% is the safe-harbor provided by Treasury Regulation
  • 38% is the most significant court decision
  • 25% is lowest favorable case law decision
  • 25% and 28.57% do not qualify pursuant to Treasury Regulation
  • 28.57% - 40% = “no man’s land” where one must rely on case law.
“Type A” Reorganization

- Defined in IRC §368(a)(1)(A)
- The most common tax-free structure for acquiring a C-corporation bank
- Typically effected as a state law merger
  - However, there is no requirement that the target corporation is the corporation merged out of existence
- Imposes few restrictions on the form of consideration paid to the target shareholders other than must contain an amount of acquirer stock sufficient to meet the COI requirement
“Type A” Reorganization

§368(a)(1)(A) statutory merger  **STEP 1**

“Type A” Reorganization

§368(a)(1)(A) statutory merger  **STEP 2**

Holding Co. A stock and other consideration

shareholders

merger
Impact of a “Type A” Reorganization

- No gain or loss is recognized by the target corporation
- No gain or loss is recognized by the acquiring corporation (unless appreciated property is distributed in the transaction)
- Gain is recognized by the target shareholders only to the extent of “boot” (typically cash) received in the transaction
- The tax basis of target’s assets and liabilities carries over to the acquiring corporation (aka “carryover basis transaction”)
- There is no step up in tax basis of the acquired assets and no tax basis in any purchase accounting premium (core deposit / goodwill) booked for financial accounting purposes

Triangular Mergers –
a Twist on the “Type A” Reorganization

- Allows stock of the corporation controlling the acquiring or merged subsidiary to satisfy the COI requirement
- In a “forward” triangular merger, the target bank is merged into the subsidiary
- In a “reverse” triangular merger, the subsidiary is merged into the target bank (target bank survives)
- Tax impact is the same as a “type A” reorganization
“Forward Triangular Merger”

Holdco A stock and other consideration

Holdco A  

Acquiring Subsidiary  

shareholders

Bank B  

merger

“Reverse Triangular Merger”

Holdco A stock and other consideration

Holdco A  

Transitory Subsidiary  

shareholders

Bank B  

merger
“Reverse Triangular Merger”

Holdco A

Bank B

§368(a)(2)(E) – END RESULT

Triangular Mergers – COI Requirements

Forward Triangular:
• COI requirement is the same as for a regular “type A” reorganization

Reverse Triangular:
• COI satisfied through statutory requirement that at least 80% of the target stock be exchanged for acquiring stock
Holding Company Elimination

- Tax-free downstream “Type A” statutory merger
- Bank succeeds to all Holdco assets
- Bank also succeeds to any available Holdco tax attributes
- Same results whether Holdco and Bank file a consolidated return or not
“Forward Cash Merger”

Holdco A Cash and/or stock that fails COI

shareholders

Holdco A

Acquiring Subsidiary

merger

Bank B

Treated as a taxable asset purchase

Taxable Stock Purchase

- Can be structured as a simple purchase of target stock or as a more complex form of reverse subsidiary acquisition
- There are no restrictions on the form of consideration paid to the target shareholders (no COI requirement)
Taxable Stock Purchase

Holdco A

Bank B stock

Cash

Shareholders

Bank B

Taxable Stock Purchase – Alternative Structure

Holdco A

Transitory Subsidiary

Bank B stock

Cash

Shareholders

Bank B

Reverse subsidiary cash merger
Rev. Rul. 90-95
**Taxable Stock Purchase**

[Diagram showing Holdco A and Bank B]

**End Result**

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**Impact of a Taxable Stock Purchase**

- No gain or loss is recognized by the target corporation
- No gain or loss is recognized by the acquiring corporation (unless appreciated property is distributed in the transaction)
- Gain is recognized by the target shareholders for the difference between the sales proceeds and their tax basis in target stock
- The “inside” tax basis of target’s assets and liabilities remains unchanged
- Acquirer has tax full tax basis for the consideration paid, but this basis is “locked up” in the subsidiary stock investment
§338(g) Election

• Available only if the buyer acquires at least 80% of target corporation’s stock in a taxable stock purchase

• Buyer can elect to treat the transaction as a taxable asset acquisition instead of a stock purchase

• The treatment of the selling corporation is not impacted by the election

• If elected, the target corporation must recognize the gain on the sale of its assets

However, this gain is deemed to occur immediately after the stock purchase, so any tax due is paid by the buyer

• If elected the buyer receives full tax basis in the value of assets acquired and can amortize any premium paid under §197

• Due to the up-front tax liability resulting from the deemed asset sale, a §338(g) election is rarely used unless the target has accumulated NOLs or credit carryforwards to offset the gain
§338(h)(10) Election

• Available only if the buyer acquires at least 80% of target corporation’s stock in a taxable stock purchase and target is:
  • 1) a subsidiary in an affiliated group; or
  • 2) an S corporation

• Both the buyer and the seller must consent to the election

If elected, both the buyer and the seller must treat the transaction as a taxable asset sale/purchase, rather than a taxable stock sale/purchase.

• The buyer receives full tax basis in the value of assets acquired and can amortize any premium paid under §197.

• The seller must measure the taxable gain/loss from the transaction using the “inside” asset basis of the target, rather than the seller’s tax basis in target stock.
§338(h)(10) Election

• If a premium is paid for the target corporation, the buyer will usually benefit from the election (and often requests one)

• Whether any benefit or cost results to the seller depends upon the difference (if any) between the “inside” tax basis of the target’s assets and the seller’s tax basis in the target stock

• The §338(h)(10) election is frequently used in S corporation acquisitions to step up the buyer’s basis in acquired assets

Taxable Stock Purchase with IRC Section 338 Election

Followed by IRC section 338 election
Taxable Stock Purchase – with IRC Section 338 Election
Alternative Structure Using Reverse Merger

Target stock shareholders

Buyer

Transitory Subsidiary

Target

Followed by IRC section 338 election

Tax Treatment of Merger Costs
Tax Treatment of Merger and Acquisition Costs

• Treasury Regulations provide significant guidance on the deductibility v. capitalization of merger and acquisition costs

• Some of this guidance is favorable and represents IRS concessions brought about as a result of recent judicial decisions

• While some of the conventions presented in the regulations offer more simplicity, the rigidity of these rules may reduce some opportunities previously available

Tax Treatment of Merger and Acquisition Costs

• The regulations resolve some, but not all, of the controversy in this area

• By conceding the deductibility of employee compensation related to merger and acquisition transactions, the IRS has removed a very significant area of frequent disagreement

• Furthermore, the regulations make it clear that post-merger integration costs are currently deductible
Tax Treatment of Merger and Acquisition Costs

• Most merger and acquisition costs, other than employee compensation and overhead, are divided into two categories:
  1. Facilitative costs (capitalized); and
  2. Non-facilitative / investigatory costs (deductible)

• Treasury Regulations provide a “bright line” test for determining whether expenses incurred in pursuing a transaction are facilitative or non-facilitative

  - The “bright line” test focuses on the earlier of:
    • The date on which the letter of intent, exclusivity agreement or similar written communication is executed; or
    • The date on which the material terms of the transaction are approved by the taxpayer’s board of directors

  • Costs incurred before the earlier of these dates are generally investigatory (deductible)
  • Costs incurred on or after the earlier of these dates are generally facilitative (capitalized)
Tax Treatment of Merger and Acquisition Costs

• However, the Regulations state that certain costs are “inherently facilitative” and therefore always capitalized no matter when they are incurred.

• These costs generally include items such as costs incurred to draft the merger agreement, fairness opinions, negotiating the structure of the transaction (including tax opinions), preparation of proxy solicitation, obtaining regulatory approval, etc.

Tax Treatment of Merger and Acquisition Costs

• The Regulations acknowledge the longstanding position that success-based fees, such as investment banker fees, can be broken down into investigatory / facilitative components based upon activities performed by the investment bankers.

• The Regulations also provide guidance on the appropriate documentation necessary to support the deduction claimed for these fees.
Tax Treatment of Merger and Acquisition Costs

• The documentation rules provide several requirements:

  • The documentation must be completed on or before the due date (including extensions) of the tax return on which the deduction is claimed.
  
  • The documentation must consist of more than "merely an allocation" between investigatory and facilitative activities.
  
  • The documentation must consist of supporting records.
    • Time records are not the only source of acceptable documentation.
    • A "typical" investment banker letter allocating estimated percentages to deductible activities without underlying documentation was insufficient to meet the documentation requirements.

Tax Treatment of Merger and Acquisition Costs

• Revenue Procedure 2011-29

  • Significantly reduces the level of disagreement between taxpayers and the IRS over what constitutes adequate documentation for success-based fees (such as investment banking fees).
  
  • Provides a safe harbor to treat 70% of the success-based fee as non-facilitative (deductible) and 30% as facilitative (capitalized) without the need to gather any supporting documentation.
  
  • Available (separately) to both the buyer and the seller.
Tax Treatment of Merger and Acquisition Costs

• In a series of subsequent rulings, the IRS ruled that non-refundable "milestone payments" credited toward an overall success-based fee for investment advisory services qualify for the 70% deduction election in Revenue Procedure 2011-29

• The guidance specifically applies to investment advisory fees paid under a success-based fee arrangement

Example:

• Investment banker charges Seller a $1 million success-based fee related to its acquisition by Buyer payable as follows:

  • $200,000 non-refundable installment payable upon issuance of a fairness opinion
  • $200,000 non-refundable installment payable upon signing of the definitive agreement
  • $600,000 non-refundable installment payable upon successful closing of the transaction ($1 million contingent fee less credit for the previous $400,000 of milestone payments applied)

• The safe harbor deduction would amount to $700,000 ($1,000,000 x 70%)
Questions?

Thank You

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