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Private Funds Update

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The Tax Cuts and Jobs Act – Material Impact on Private Funds

On December 22, 2017, the president signed the tax reform bill formerly known as the Tax Cuts and Jobs Act (the TCJA).[1] While the TCJA will impact many types of taxpayers, some of the more significant changes are relevant to private equity funds and others in the investment management industry. We highlight below several of these provisions and their potential implications. For calendar year taxpayers, most of the TCJA provisions discussed below became effective on January 1, 2018.

Fund and Management Company Issues

Three-Year Holding Period for Long-Term Capital Gains Treatment for Carried Interests

Effective for tax years beginning January 1, 2018, the TCJA imposes a three-year holding period requirement to treat capital gain derived from certain partnership profits interests as long-term capital gain (prior to the change, the holding period requirement was one year). Generally, affected profits interests include those transferred or held in connection with the performance of substantial services in the trade or business of raising or returning capital and investing in, or disposing of, or developing securities, commodities, debt instruments, options, derivatives, real estate held for investment, or any interest in a partnership to the extent of the partnership's interest in any of the foregoing assets. Thus, the provision is intended to apply to carried interests issued by private equity and other investment funds, though as discussed below the practical impact of the three-year holding period requirement in the typical fund setting may be of limited significance.

Notably, the three-year holding period requirement generally does not apply to a profits interest issued by a partnership that is engaged in an operating business, meaning that profits interests issued by portfolio companies are not expected to be impacted by the new rule. In addition, the carried interest provision does not grandfather existing profits interests, such that profits interests issued prior to January 1, 2018 will be subject to the new holding period requirement. If the provision applies, the affected capital gain is treated as short-term capital gain, which is subject to tax at ordinary income rates. Short-term capital losses should be available to offset any such short-term capital gain.

The rule appears to apply the three-year holding period requirement both to asset sales at the partnership level as well as to direct sales of an affected partnership interest. However, absent future

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administrative guidance to the contrary, a holder of a profits interest who is subject to the new rule and has held the profits interest for less than three years may, nevertheless, achieve long-term capital gain treatment with respect to allocations of capital gain from a partnership if the partnership's holding period for the sold asset is more than three years. In addition, the availability of long-term capital gains rates for qualified dividend income allocated with respect to carried interest does not appear to be affected by the new rule.

The TCJA's carried interest provision is significantly less onerous than many prior carried interest proposals. Although the provision is intended to apply to carried interests issued by private equity and other investment funds, as a practical matter, the provision may not operate to convert what would have been long-term capital gain to short-term capital gain in the typical case. For hedge funds, which generally dispose of assets with holding periods of less than one year (thus producing short-term capital gain in any event), the provision may not have an extensive impact. For private equity funds, which typically have a holding period for portfolio investments of longer than three years, the provision can be expected to apply only in limited cases.

In addition, the carried interest provision includes a special rule under which a partnership interest that otherwise would be subject to the three-year holding period requirement is excepted from the rule if it is held by a person who is employed by another entity that is engaged in a trade or business (other than one of the trades or businesses mentioned above)—for example, an operating business—and provides services only to such other entity. Thus, for example, in the private equity setting it appears that a portfolio company executive or other employee may be able to receive a carried interest in an upper-tier partnership without triggering the three-year holding period requirement, notwithstanding that the partnership itself is engaged in a trade or business of investing that would otherwise implicate the new rule.

The three-year holding period requirement also does not apply to (1) interests held, directly or indirectly, by a corporation, or (2) to capital interests that provide a right to share in partnership capital commensurate with the amount of capital contributed or with the amounts included in income as compensation under Section 83. Although exception (1) above may at first appear to permit circumvention of the new rule by holding what otherwise would be an affected profits interest through an S corporation, future administrative guidance or technical correction legislation may clarify that this is not an available planning opportunity. With regard to exception (2) above, currently it is unclear whether allocations of income, as opposed to contributions to capital, may give rise to a capital interest that would be eligible for the exception, though the plain language of the statute appears to focus solely on capital contributions.

It is anticipated that regulations or other guidance will be issued clarifying the scope of these new rules as a number of uncertainties remain (for example, the application of the new carried interest rules in connection with tiered partnerships).

Miscellaneous Itemized Deductions Eliminated

Under the law in effect for 2017 and prior years, individuals were permitted to deduct certain miscellaneous itemized deductions (for example, investment management fees) to the extent that such deductions exceeded 2 percent of adjusted gross income. Under the TCJA, however, effective for tax years after December 31, 2017 and before January 1, 2026, miscellaneous itemized deductions, including investment management fees, will no longer be deductible for individuals, trusts, and estates.

20 Percent Pass-Through Income Deduction

Effective for tax years beginning after December 31, 2017 and before January 1, 2026, the TCJA provides a new deduction for "qualified business income" (QBI) earned by individuals and certain

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trusts and estates through partnerships, S corporations, and sole proprietorships. Specifically, the TCJA permits a deduction of up to 20 percent of such income, thereby potentially reducing the top marginal US federal income tax rate for such income from 37 percent to 29.6 percent.

In general, QBI is the net income, gain, deduction, and loss that would be effectively connected with a US trade or business under current US Internal Revenue Service (IRS) Code Section 864(c) (subject to the exceptions discussed below). QBI specifically excludes, however, income derived from certain service businesses as well as income derived from investment management, trading, or dealing in securities, unless in the case of a specified service business a taxpayer's taxable income for the taxable year is less than an inflation-adjusted threshold amount ($315,000 for married filing jointly taxpayers and $157,500 for single filers, subject to a phase-out for income in excess of the threshold amount of $100,000 for married filers or $50,000 for single filers). QBI also specifically excludes passive-type income (according to the Conference Report apparently even if attributable to a qualifying business), such as dividends, capital gains, and interest (unless the interest is properly allocable to a lending business). Thus, the deduction generally is not expected to be available for management fees or flow-through income earned in connection with asset management activities. Though not included in the definition of QBI, a portion of the ordinary dividends received from a REIT and qualified publicly traded partnership income also are potentially deductible.

Despite the limitations noted above, the deduction will not be entirely irrelevant for investment funds, however, because flow-through income earned through portfolio companies organized as partnerships or LLCs may be eligible for the deduction. Nevertheless, even in this case the availability of the deduction could be limited due to various nuances in the computation of the deduction. Specifically, the pass-through deduction generally is capped at the greater of (1) 50 percent of the individual's allocable share of the W-2 wages paid by the qualified business and (2) 25 percent of such W-2 wages plus the individual's allocable share of 2.5 percent of the unadjusted basis of the qualified business's tangible depreciable assets (although these caps do not apply for taxpayers with taxable income below the above-mentioned threshold amounts). Thus, qualifying for the deduction may depend on structuring compensation at the portfolio company level to be treated as W-2 wages, rather than as guaranteed payments (reported on Form K-1) or payments to independent contractors (reported on Form 1099). If the deduction is expected to be available, it may be desirable to restructure tax distribution provisions to take the deduction into account.

Further, even if the deduction is available, due to the lowering of the corporate income tax rate to 21 percent, consideration must be given to organization of the portfolio company as a C corporation, although flow-through status generally can be expected to remain the default position. Organization of a portfolio company as a flow-through may remain the default position, even when the flow-through deduction is unavailable, in light of (1) the similar effective rates of tax, taking into account taxes on net investment income and self-employment income, applicable to income generated from a flow-through versus a C corporation (assuming current distributions of earnings), (2) the ability to deliver a step-up in tax basis while incurring only one level of tax, (3) the possibility that the corporate rate could be increased in the future, (4) potential state corporate income taxes (though it should be noted that, unlike individuals, the deduction for state income taxes remains available to corporations under the TCJA), and (5) the general inability to convert from a C corporation to a flow-through in a tax-free manner (other than in the case of an S corporation election, which generally is not feasible in the investment fund setting). A C corporation, however, may offer advantages that, when taken into consideration over the course of the investment (including on exit), result

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in an overall better after-tax position, including, for example, the potential treatment of C corporation shares as qualified small business stock under Section 1202, potentially better treatment of certain types of income in the hands of a C corporation versus a pass-through under certain international provisions of the Code (as discussed further below), and the ability to reinvest a greater amount of after-tax earnings into the portfolio company's business in light of the 21 percent federal tax rate applicable to C corporations (subject to potential application of an accumulated earnings tax). Future administrative guidance or legislative changes may further alter this calculus, potentially militating in favor of taking a wait-and-see approach in favor of flow-through status, at least through 2018.

Repatriation of Existing Offshore Earnings

The TCJA imposes a one-time transition tax on certain foreign earnings through a deemed repatriation of such earnings. Under this provision, any 10 percent US shareholder (by vote) of a foreign corporation as of December 31, 2017 must include in income for taxable year 2017 its proportionate share of the foreign corporation's undistributed earnings if such foreign corporation is a "controlled foreign corporation"[2] (CFC) or is a foreign corporation with at least one 10 percent US corporate shareholder. In the case of a corporate shareholder, earnings held by the foreign corporation as cash or cash equivalents are subject to tax at a rate of 15.5 percent, and earnings invested in non-cash assets are subject to tax at a rate of 8 percent. In the case of an individual, the rates of tax are approximately 17.5 percent for cash and cash equivalents and 9.05 percent for non-cash assets. US shareholders may elect to pay the tax without interest over an eight-year period with significant backloading (that is, 8 percent in each of the first five years, 15 percent in the sixth year, 20 percent in the seventh year, and 25 percent in the eighth year). It should be noted, however, that the first installment of the tax will be due with the taxpayer's 2017 return to be filed in 2018.

Significantly, although mainly aimed at ending deferral of the taxation of offshore earnings of multinational corporations, the deemed repatriation provision may result in phantom income (that is, income without a related cash distribution) for US investors in a US fund when the fund held shares of a foreign corporation amounting to a 10 percent voting interest as of December 31, 2017, even if such investors' indirect interests in the foreign corporation were below 10 percent as of such time. Further, it may not be possible for the fund to compel a cash distribution from the foreign corporation to support a distribution from the fund to pay the tax. As noted above, the imposition of the tax may be spread out over an eight-year period. However, the first installment of the tax would be due with the investors' 2017 tax returns to be filed in 2018. Accordingly, fund managers should review their holdings in shares of foreign corporations to ascertain the extent to which the deemed repatriation provision may impact the fund's US investors.

Limitation on Deductibility of State and Local Taxes

The TCJA significantly limits an individual's ability to deduct state and local taxes through 2025. The TCJA permits deductions of up to $10,000 for income, property and sales taxes. The $10,000 cap does not apply, however, to property and sales taxes that are attributable to the individual's trade or business or Section 212 investment activity.

Portfolio Company and Investment Related Issues

Lower Corporate Tax Rates

Under the TCJA, the US federal tax rate of corporations has changed from a progressive rate schedule with a maximum rate of 35 percent to a flat rate of 21 percent. In addition, the corporate alternative minimum tax has been repealed. In general, these changes are effective for a corporation's first taxable year beginning after December 31, 2017.

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The reduction of the corporate tax rate has a number of implications with respect to M&A activity, inbound investments, and choice of entity, including:

- The lower tax rate would appear to decrease the value to a buyer of obtaining a tax basis step-up (and similarly lower the cost to a corporate seller of effecting an asset sale). However, each case will need to be separately evaluated. For example, after accounting for immediate expensing (see below under "*Immediate Expensing*"), the net present value of an asset purchase, especially to a financial buyer with a short-term investment horizon as opposed to a strategic buyer, may be greater compared to the case in which assets would generally need to be depreciated over their useful life, though lurking depreciation recapture may undercut the benefit. In the case of stock sales, the cost of disposing of unwanted assets prior to the completion of a transaction will be reduced.
- Non-US and tax-exempt investors that may have chosen to invest in a pass-through business or real estate investment through a so-called blocker corporation to avoid effectively connected income (ECI) (in the case of a non-US investor) or unrelated business taxable income (UBTI) (in the case of a US tax-exempt investor) will enjoy a lower US federal income tax burden in connection with such investment and, as a consequence, may be more inclined to consider making such investments (or investing in private funds taxed as partnerships that in turn make such investments).
- As noted above, the choice of entity of a portfolio company as a C corporation or a flow-through vehicle will require a separate analysis for each investment opportunity.

Limitation on the Deduction of Business Interest

Section 163(j) (the old so-called "earnings stripping rules" addressing interest payments to non-US related parties) has been repealed and replaced with new Section 163(j) that introduces substantial limitations on the deductibility of business interest. Effective for taxable years beginning after December 31, 2017, the deduction for business interest will be limited to the sum of (1) business interest income for such year; (2) 30 percent of "adjusted taxable income" for such year (which cannot be less than zero); plus (3) floor plan financing interest for such year.

"Adjusted taxable income" essentially refers to EBITDA (that is, earnings before interest, taxes, depreciation, and amortization) for taxable years before January 1, 2022 and EBIT (that is, earnings before interest and taxes) for taxable years beginning January 1, 2022. Specifically, "adjusted taxable income" means a taxpayer's taxable income, computed without regard to (1) any item of income, gain, deduction, or loss that is not properly allocable to a trade or business; (2) any business interest or business interest income; (3) the amount of any net operating loss (NOL) deduction under Section 172; (4) the amount of any deduction under Section 199A; and (5) in the case of taxable years beginning before January 1, 2022, any deduction allowable for depreciation, amortization, or depletion. Business interest that is not deductible under new Section 163(j) generally may be carried forward indefinitely, except with respect to partnerships, which are subject to certain special rules.

"Business interest" means interest paid or accrued on debt properly allocable to a trade or business and does not include investment interest. Notably, the limitations under new Section 163(j) do not apply to a taxpayer whose average annual gross receipts for the three-year period ending with the prior tax year do not exceed $25 million or to an electing real property trade or business. An electing real property trade or business includes any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business. Given the carve-out from Section 163(j) for an electing real

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property trade or business, debt-financed corporate blockers typically used by non-US investors and certain tax-exempt investors to invest in US real estate may still be attractive, or arguably are now more attractive (especially in light of the reduced corporate tax rates noted above).

Immediate Expensing

The TCJA provides for an immediate deduction (rather than required capitalization and depreciation) for the cost of "qualified property" placed in service by the taxpayer after September 27, 2017 and before January 1, 2023. For this purpose, qualified property generally is tangible property (including computer hardware) with a recovery period of 20 years or less and certain computer software. After December 31, 2022, the TCJA phases out immediate expensing.

Importantly, the new rules apply both to new property as well as used property acquired from a third party. Therefore, it may be more desirable for buyers of target corporations holding material "qualified property" to structure the transaction as an asset sale at a reduced corporate income tax cost to the seller given the reduced corporate income tax rates, though it should be noted in the majority of cases it can be expected that a significant portion of the purchase price will be allocated to goodwill and other intangible assets, the cost of which is not eligible for immediate expensing.

Additionally, it is worth noting that a taxpayer may elect out of immediate expensing on a class of property basis each year that such property is placed in service. Taxpayers with NOLs that will not initially benefit from such immediate deductions may choose to make such elections.

NOL Limitations

The NOL deduction now is limited to 80 percent of taxable income, calculated without regard to the NOL deduction. In addition, the two-year carryback of NOLs generally has been repealed. However, NOLs now may be carried forward indefinitely. These rules are effective for losses and NOLs arising in taxable years beginning after December 31, 2017.

Codification of Revenue Ruling 91-32 – Gain on the Sale of Certain Partnership Interests by Non-US Persons

The IRS announced its longstanding position in Revenue Ruling 91-32 that gain or loss realized by non-US persons from the disposition of an interest in a partnership that conducts a trade or business through a permanent establishment or fixed place of business in the United States should be treated as ECI to the extent of the portion of the entity's assets that are used in such US trade or business. In other words, the ruling treats a portion of the resulting gain or loss as ECI based on the distributive share of partnership net ECI gain or loss that the non-US partner would have borne if the partnership had itself disposed of all of its assets. However, in 2017 the Tax Court rejected this position.[3] The TCJA, in turn, effectively codifies the reversal of the Tax Court case.

Under the TCJA, if a non-US person disposes of an interest in a partnership engaged in a trade or business in the United States through a permanent establishment or fixed place of business, gain or loss on the disposition of such partnership interest is treated as ECI in proportion to the assets held by the partnership and used in the conduct of such US trade or business. The buyer of an interest in a partnership that is engaged in a US trade or business generally is required to withhold 10 percent of the purchase price of such partnership interest unless the seller provides an affidavit certifying its status as a US person (similar to a FIRPTA certificate). If the buyer fails to withhold, then the partnership will be liable for the withholding. Purchase agreements should be updated to include delivery of an affidavit from the seller as a closing deliverable as appropriate. This provision applies to sales, exchanges, and dispositions of a partnership interest on or after November 27, 2017, though the withholding requirements apply only to sales, exchanges, and dispositions of a partnership interest after December 31, 2017.

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Certain International Provisions

Impact on the Controlled Foreign Corporation Regime

The TCJA maintained many of the provisions applicable to CFCs and significantly expanded the regime through the addition of a new class of income under Section 951A labeled "Global Intangible Low-Taxed Income," or GILTI (discussed below), thus making the shift to a territorial regime through the new participation exemption (also discussed below) only partial. As a general matter, the rules relating to Subpart F income (generally including various types of passive income, including dividends, interest, gains from the sale of stock or securities, gains from certain futures transactions in commodities, and foreign based company sales and services income) remain intact and, as a consequence, a US shareholder of a CFC is still required to include its pro-rata share of Subpart F income in its taxable income currently, regardless of whether such income has been actually distributed to the US shareholder. However, the TCJA made the following noteworthy revisions with regard to the Subpart F regime: (1) the TCJA expanded the definition of US shareholder for purposes of the CFC rules to include a US person that owns (directly, indirectly, or through attribution) 10 percent or more of the vote *or* value of a non-US corporation's stock (prior to the TCJA, the test was based solely on vote); (2) the TCJA modified stock attribution rules for purposes of determining whether a non-US corporation is a CFC such that stock owned by a non-US person may be attributed to a US person; and (3) the TCJA eliminated the requirement that a non-US corporation must be a CFC for 30 days within a taxable year as a prerequisite to the application of Subpart F.

In addition, it is noteworthy that the TCJA did not repeal Section 956. Under Section 956, a US shareholder of a CFC generally must include in income a CFC's non-US earnings that are invested in US property, which, for this purpose, includes certain credit support for US related-party debt. A corporate shareholder of a CFC will be subject to US federal income tax at a rate of 21 percent with respect to Subpart F income and Section 956 inclusions as such income will not be eligible for the participation exemption discussed below (whereas if Section 956 does not apply, and if the earnings giving rise to the inclusion were not Subpart F income or GILTI, the earnings generally could escape US taxation entirely by virtue of the new participation exemption).

Participation Exemption

The new participation exemption constitutes a shift to a partial "territorial" regime for income earned by foreign subsidiaries of US parented corporate groups. In general, the TCJA provides a US corporate shareholder of a "specified 10 percent owned foreign corporation" with a 100 percent dividends received deduction for the foreign-source portion of the dividends received from such corporation (with the effect of exempting such dividend from the US federal income tax base). A one-year holding period generally is required to qualify for the participation exemption.

A "specified 10 percent owned foreign corporation" generally is any non-US corporation that has at least one US corporate shareholder that owns at least 10 percent of the stock of the non-US corporation (excluding a passive foreign investment company that is not also a CFC). The participation exemption applies to distributions from a CFC to the extent the earnings attributable to such distribution do not otherwise constitute Subpart F income or GILTI (or were includible previously under Section 956). A US corporate shareholder is not entitled to the indirect foreign tax credit with respect to the exempt portion of any dividend received from a specified 10 percent owned foreign corporation. The basis of a specified 10 percent owned foreign corporation must be reduced by the exempt portion of a dividend for purposes of determining a loss with respect to the later sale or disposition of such corporation's stock. These rules are effective for taxable years beginning after December 31, 2017.

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It should be noted that the participation exemption generally does not apply to gains realized on the sale of stock of a non-US corporate subsidiary. However, any gains realized on the sale of stock of a CFC that are treated as a dividend under Section 1248 are eligible for the exemption. Thus, US corporate shareholders of a CFC may be eligible for the participation exemption with respect to gains on the sale of subsidiary stock to the extent of the shareholder's pro-rata share of undistributed earnings and profits at the time of such sale. On the one hand, this may encourage Section 338 elections with respect to the sale of non-US subsidiary stock, but the impact of the new GILTI rules must be considered prior to making such election. If a specified 10 percent-owned foreign corporation is not a CFC, a US corporate shareholder that disposes of such stock will be subject to US federal income tax on the gains realized on such disposition even if such entity has undistributed and untaxed earnings and profits at the time of such sale.

GILTI (Pronounced "Guilty")

As noted above, the TCJA added new Section 951A, which effectively expands the CFC anti-deferral regime to include a new class of income known as GILTI. The GILTI provisions became effective for taxable years of foreign corporations beginning January 1, 2018. GILTI is essentially a new type of income that may be taxed to US shareholders of a CFC in a manner similar to the taxation of Subpart F income. In general, GILTI includes all net operating income (taking into account allocable interest deductions) of a foreign corporation not otherwise taxed to US shareholders in excess of a 10 percent return on the adjusted cost basis of the tangible assets of the company used in the production of such operating income. Any GILTI realized by a CFC is taxed to the US shareholders of that CFC, whether or not the income is actually distributed to such US shareholders.

While a US corporate shareholder of a CFC is not entitled to the above-mentioned participation exemption with respect to GILTI, such shareholders are entitled to preferential treatment with respect to GILTI as compared to non-corporate shareholders. Any GILTI of a US corporate shareholder (excluding S corporations) is eligible for a special deduction, such that the effective US federal income tax rate to such US corporate shareholder is 10.5 percent for taxable years beginning after December 31, 2017 and before January 1, 2026 and 13.125 percent for taxable years beginning after December 31, 2025. In addition, a US corporate shareholder is eligible for an indirect foreign tax credit of 80 percent of the foreign taxes paid with respect to GILTI. By contrast, any GILTI of an individual is subject to tax at regular income tax rates (a top rate of 40.8 percent in 2018 under the TCJA after accounting for the additional 3.8 percent tax that may apply to net investment income). Thus, any US individual shareholder that would have realized (directly or indirectly through a pass-through) "qualified dividend income" (taxed at a maximum US federal income tax rate of 23.8 percent after accounting for the additional 3.8 percent tax that may apply to net investment income) will be significantly worse off under the TCJA to the extent any CFC with respect to which it is a US shareholder earns GILTI, whereas a US corporate shareholder may fare better than under pre-TCJA rules since such GILTI will be subject to US federal income tax at a rate substantially less than the previous top US federal income tax rate of 35 percent. Finally, it would appear that any GILTI of a US tax-exempt organization or pension fund would not be subject to US federal income tax unless such income constitutes UBTI.

The new GILTI provisions could apply to a domestic fund (for example, a private equity fund) that holds more than 50 percent of the stock of a non-US corporation. Such a domestic fund would be a US shareholder of the non-US corporation under the CFC rules and would be required to include on the K-1s of the investors and general partners of the fund their allocable share of the non-US corporation's GILTI on an annual basis. The GILTI provisions also

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could apply to a domestic fund holding 10 percent or more (by vote or value) of the stock of a non-US corporation if after accounting for other US shareholder groups such non-US corporation were a CFC. On the other hand, if a fund were set up as a non-US vehicle (for example, a Cayman Islands limited partnership), it would be less likely that a non-US corporation would be a CFC with respect to the investors of the fund because the CFC test would be applied by testing the indirect participation in the non-US corporation of the investors of the fund rather than the fund's participation in the corporation.

On account of the new GILTI rules, fund managers generally should consider (1) whether any of their fund investments are in CFCs; (2) if a fund does have investments in CFCs, whether tax distribution provisions will be triggered if the fund has any GILTI that is allocated to its investors or managers; and (3) whether investments in CFCs that are held by domestic funds should be moved into offshore alternative investment vehicles or whether there may be other ways to change the classification of existing investments so as to turn off the CFC rules.

Foreign-Derived Intangible Income

As a complement to the GILTI rules, and with an emphasis on incentivizing US companies to maintain onshore operations, the TCJA added the foreign-derived intangible income (FDII) regime, which includes a 13.125 percent tax rate (increased to 16.41 percent in 2026) for a domestic corporation's FDII. Calculated in a similar fashion to GILTI, FDII generally is income related to services provided and goods sold by a US corporation to foreign customers. The rules related to FDII apply to taxable years beginning after December 31, 2017.

Conclusion

This article briefly summarizes some of the material provision of the TCJA that will have an effect on private funds and their investors. In light of the TCJA's significant ambiguous and uncertain application to a variety of industries, the precise impact of the TCJA on all taxpayers, including the private fund industry, remains to be seen and likely will require interpretive guidance from the IRS and/or corrections legislation from the US Congress. As such, it will be important to continually monitor the impact of the TCJA on the private funds industry.

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NOTES

1 Unless otherwise indicated, all Section references are to the Internal Revenue Code of 1986, as amended up through the enactment of the TCJA (the Code).

2 For purposes of the deemed repatriation rule, a CFC generally is a non-US corporation more than 50 percent of the stock of which is owned by US shareholders holding at least 10 percent of the CFC's voting stock. For purposes of the discussion applicable to CFCs under the heading "Certain International Provisions," a CFC generally is a non-US corporation more than 50 percent of the stock of which is owned by US shareholders holding at least 10 percent of the CFC's stock by vote or value.

3 *See* Grecian Magnesite Mining, Industrial & Shipping Co., SA v. Commissioner, 149 T.C. 3 (2017).

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