SHEARMAN & STERLING LLP

Practice Group Newsletter

FOCUS ON TAX CONTROVERSY AND LITIGATION

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Editor's Note

Dear Readers,

This issue features articles discussing the Tax Court's recent whistleblower decision in *Cohen*, the Tax Court's recent holding in *Hewlett-Packard* including non-sales income in gross receipts for Section 41 research credits, and the decision of the U.S. Bankruptcy Court for the District of Delaware confirming the Solyndra bankruptcy plan.

If you have comments or suggestions for future publications, please contact Lawrence M. Hill at lawrence.hill@shearman.com. They are very much appreciated.

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Tax Court Cannot Reopen Whistleblower Claim in *Cohen*

On October 9, 2012, the Tax Court held that a taxpayer is not entitled to relief under section 7623(b)[1] when the Internal Revenue Service ("IRS") denies a whistleblower claim without initiating any administrative or judicial action against the subject of the claim or collecting proceeds from such claim.2

Petitioner Raymond Cohen, a certified public accountant, filed a Form 211, Application for Award for Original Information, with the Whistleblower Office of the IRS. Mr. Cohen's claim was based on alleged tax law violations that he observed when his wife served as the executrix of an estate with uncashed stock dividend checks issued by a public corporation. The corporation refused to cash the checks when requested, leading Mr. Cohen to suspect that the corporation normally retained possession of unclaimed proceeds from uncashed checks and unredeemed bonds. Mr. Cohen requested information about the corporation from the state comptroller and learned that the corporation had not reported any uncashed dividends from stocks from 2005 to 2008. This information served as the basis of Mr. Cohen's claim on the Form 211 application, in which he alleged that the corporation possessed unclaimed assets worth more than $700 million.

The Whistleblower Office notified Mr. Cohen that he was not eligible for an award because the IRS did not proceed with any administrative or judicial action based on his claim and thus it did not lead to the collection of any proceeds. Mr. Cohen requested a reconsideration of his claim, and the Whistleblower Office reiterated the denial, stating that his claim was based on publicly available information. Mr. Cohen filed a petition in Tax Court, requesting that the court order the IRS to reopen the claim. The IRS moved to dismiss the case for failure to state a claim upon which relief could be granted and Mr. Cohen responded with a motion for summary judgment.

Mr. Cohen's request for relief was based on section 7623(b), which authorizes an award to a whistleblower of an amount between 15 and 30 percent of any amount collected when the IRS proceeds with an administrative or judicial action based on information that the whistleblower brought to the IRS's attention.

Citing section 7623 and *Cooper v. Commissioner*,[3] the Tax Court stated that in a whistleblower action, it only has jurisdiction with respect to a final award determination by the IRS. The court explained that its jurisdiction does not permit it to review IRS determinations of the alleged tax liability on which the whistleblower claim is made, nor does it permit the court to direct the IRS to commence an administrative or judicial action. Therefore, in a situation where the IRS did not commence any action or collect any proceeds, the court was unable to order the IRS to reopen the claim and Mr. Cohen was not entitled to the relief that he had requested.

The court also rejected Mr. Cohen's argument that he was entitled to a legal and factual explanation of why the IRS rejected his claim, holding that the IRS was not obligated to explain its reasons for not pursuing a claim. Finally, the court denied Mr. Cohen's request for equitable relief because of the limited equitable remedies available in the Tax Court and the absence of any provisions under section 7623(b) providing equitable relief. The court granted the IRS's motion to dismiss for failure to state a claim upon which relief can be granted and denied petitioner's motion for summary judgment.

—M. Henkel

[1] All section references are to the Internal Revenue Code and all references to the regulations are to the Treasury regulations issued thereunder, unless otherwise noted.
[2] *Cohen v. Commissioner*, 139 T.C. No. 12 (Oct. 9, 2012).

[3] 135 T.C. 70, 75-76 (2010).

Tax Court Includes Non-Sales Income in Gross Receipts for HP's Section 41 Research Credit

On September 24, the Tax Court issued an opinion in *Hewlett-Packard Co. v. Commissioner*.[4] The issues presented in the case focused on Hewlett-Packard's ("HP") exclusion of intercompany gross receipts received from controlled foreign corporations ("CFCs") and certain nonsales income, including dividends, interest, and rent, from its "average annual gross receipts" ("AAGR") when computing its section 41 research credits for prior tax years. The court granted partial summary judgment for HP with respect to the exclusion of CFC receipts because the government conceded the point. The court also granted partial summary judgment for the government on the second issue, finding the definition of "gross receipts" broad enough to encompass nonsales income.

The section 41 credit provides an incentive for companies to increase research activities that result in innovation and stimulate the economy. HP claimed credits for its research activities during the relevant years, electing to calculate the credits using the alternative incremental credit computation ("AIRC") method described in Section 41(c)(4). The AIRC method utilizes a three-tiered formula that calculates the credit based on how much the taxpayer's qualified research expenses ("QREs") exceeded certain percentages of the AAGR for the taxable year. Under Section 41(c), AAGR is calculated based on gross receipts of the taxpayer for the four years preceding the taxable year for which the credit is being determined. The term "gross receipts" is not expansively defined in the statute, except for a reduction for "returns and allowances made during the taxable year." During the years at issue, proposed regulations provided certain exclusions from gross receipts but otherwise included the "total amount…derived by the taxpayer from all its activities and from all sources (*e.g.*, revenues derived from the sale of inventory before reduction for cost of goods sold)."[5] In 2001, final regulations substantially adopted the broad definition in the proposed regulations.[6] However, as the court noted, the final regulations apply only to taxable years beginning after January 3, 2001, thus excluding the years at issue in *Hewlett-Packard Co. v. Commissioner*.

As a result of the credit calculation formula, higher amounts of gross receipts will generally result in smaller research credits. HP took the position that nonsales income should not be included in gross receipts for purposes of the AIRC formula. Therefore, from 1999 through 2001 HP excluded from gross receipts the income reported on its Form 1120 return as Dividends, Interest, Gross Rents, Gross Royalties, and Other Income. This generated larger credits than would be calculated by including the nonsales amounts and resulted in the challenge by the Commissioner that led to HP's Tax Court petition.

HP made several arguments that the Tax Court rejected. HP first suggested that the government's position that nonsales income should be included in gross receipts was a retroactive application of the definition in the regulations that were not effective during the relevant years. The court disagreed, noting that the logic of the regulations and statements in the preamble thereto were equally applicable to tax years before the effective date as well as after. The court quoted the preamble, stating that a business may take into account any expected income, including nonsales amounts, to plan its research budget. Further, some businesses do not have any sales income. Treasury also expressed concern in the preamble that if the definition of gross receipts was narrowed, the credit computation would be "vulnerable to manipulation."

While agreeing with the Treasury's logic, the court also noted that the statute and legislative history did not provide specific guidance as to which categories of income should be included in gross receipts. HP argued that the exclusion for "returns and allowances" suggests a merchant business application, thus showing that Congress intended a sales or service income limitation. Further, HP argued that Black's Law Dictionary defined

4 139 T.C. 8 (2012).

5 Prior Prop. Reg. § 1.41-3(c)(2), 63 F.R. 66507, 66508 (Dec. 2, 1998).

6 T.D. 8930, 2001-1 C.B. 433.

gross receipts narrowly to include primarily sales or service income. However, the court observed that nowhere else in the Internal Revenue Code has the term "gross receipts" been interpreted so narrowly. Rather, the Tax Court suggested that Congress intended a broad, inclusive definition for the term, evidenced by the use of specific exclusions to limit its scope in section 41 and other provisions that use the term. The court further noted that section 448(c)(3)(C), the most analogous statutory provision to section 41(c), encompasses a broad definition. The court quoted section 1.448-1T(f)(2)(iv), Temporary Income Tax Regs., which states that, among other things, gross receipts include any investment income and income from incidental or outside sources, such as dividends, royalties, and annuities regardless of whether such amounts are derived through the taxpayer's trade or business. This broad meaning contradicted the Black's Law Dictionary definition cited by HP, which included a citation to section 448 and the relevant regulation.

HP further argued that the "Gross receipts or sales" language used on Line 1(a) of Form 1120 (during the relevant years) showed that the Commissioner used the two concepts interchangeably. The Tax Court doubted that such IRS forms provided any authoritative guidance, particularly because the statute and legislative history make no mention of the form. Finding the argument irrelevant, the Court instead focused on the legislative history of section 41. HP further argued that the legislative history used the terms sales and gross receipts interchangeably. The Court noted that the history lacked "distinctive clarity" on the point, but the true intent of Congress was discernible. If HP's theory was accepted, Congress would have extended preferential treatment to businesses with little or no sales activity. In that case, businesses that have primarily licensing or investment income would get larger credits because the statutory formula generally reduces the credit amount as gross receipts increase. Even companies within the same field could be treated differently based on their business model. The court did not find any evidence that Congress intended to treat businesses differently based on whether they had sales income. Rather, the legislative history suggests that Congress sought to index the credit based on the total amount of receipts that the business would use to determine its research budget, not merely sales income.

Lastly, the Tax Court cited the maxim *expressio unius est exclusio alterius*, which prohibits the court from finding additional exceptions by implication when Congress explicitly enumerated certain exceptions and evidence of legislative intent to permit such additional exceptions is wanting. Therefore, the court did not read any further limitations into the definition of gross receipts beyond the Congressional exclusion of "returns and allowances."

Based on the broad definition of "gross receipts," the Tax Court granted partial summary judgment for the Commissioner. Thus, HP was required to include nonsales income in its AAGR when calculating the section 41 credits for the years at issue. The Tax Court also granted partial summary judgment for HP based on the Commissioner's concession regarding the exclusion of intercompany gross receipts from CFCs.

—D. Smith

Federal Court Confirms Solyndra Bankruptcy Plan

On October 22, the US Bankruptcy Court for the District of Delaware confirmed solar company Solyndra Inc.'s reorganization plan over objections from the IRS that the plan's principle purpose was tax avoidance.[7] The government, which subsequently filed its appeal of Judge Mary F. Walrath's ruling on November 1, 2012,[8] objected to the plan under Bankruptcy Code section 1129(d) and argued that the plan's principal purpose was tax avoidance. Under the plan, Solyndra's owners, venture capital investors Argonaut Private Equity and Madrone Capital Partners, retained significant tax benefits in the form of net operating losses. The judge rejected the government's arguments, however, and confirmed the plan because she found that the evidence did not support

[7] *In re Solyndra LLC*, 11-12799, (U.S. Bankr. Del.).

a finding that the principal purpose of the plan was tax avoidance.

—E. McGee

FATCA Update

Online FFI Agreement Registration System

The Foreign Account Tax Compliance Act ("FATCA") foreign financial institution ("FFI") online registration system will be up and running by January 1, 2013. After launch, further changes may be made to the system to account for intergovernmental agreements. This was reported by William Holmes, director (international data management), IRS Large Business and International Division ("LB&I"), speaking on his own behalf at an industry conference on October 4th.[9]

Various officials from LB&I spoke at the event. Holmes estimated that about 600,000 FFIs would use the online registration system to enter into FFI agreements with the IRS. He noted that he would prefer that FFIs use the system in waves to avoid a crush of applicants trying to use the system shortly before the June 30, 2013 deadline. A different LB&I official speculated that the system could be changed to adapt to changes in FATCA regulations, while another explained the IRS identity verification and online registration process for FFI agreements. As explained by the LB&I official, an individual registrant acting on behalf of an FFI without a Social Security Number will create an online account and then send paper verification of such its identity to the IRS. A registrant with a Social Security Number, on the other hand, will be deemed complaint and receive an FFI identification number within 48 hours. Once a responsible officer has received a FATCA individual identification number, he or she can sign on behalf of many FFIs without having to go through the verification process again.

[8] *In re USA v. Solyndra LLC*, 12-cv-01380, (Dist. Del.).

[9] *See* Amy S. Elliot, "IRS Offers Details on FATCA Registration Process," *Tax Notes International*, Oct. 15, 2012.

Update on Intergovernmental Agreements

Treasury Associate International Tax Counsel Jesse Eggert appeared at a conference on October 22 to deliver information about Treasury's progress negotiating FATCA Intergovernmental Agreements ("IGAs") and finalizing proposed FATCA regulations.[10] Eggert reported that final regulations should be issued by the end of the year and will deal with questions like U.S. corporate issuance of bonds to foreign holders and whether a British branch of a U.S. bank is treated as a U.K. or U.S. entity under the new U.K. IGA.

Eggert reported that not just treaty countries are interested in negotiating IGAs. He reported "overwhelming interest" in negotiating IGAs. He explained that Treasury aimed to make the IGAs as consistent as possible.

Announcement 2012-42

On October 24, the IRS set new, later implementation dates for due diligence procedures to identify and document accounts under FATCA, giving taxpayers more time to implement changes.[11]

According to the announcement, the final rules will provide that withholding on payments of gross proceeds will not begin until January 1, 2017 – a two year push back from the prior deadline – and the scope of grandfathered obligations will include three additional categories: some foreign passthrough payments, derivatives that give rise to dividend equivalent payments, and obligations to make a payment regarding collateral posted on a notional principal contracts.

— A. Simon & D. Jones

[10] *See* Lee A. Sheppard, "Eggert Provides Update on FATCA Intergovernmental Agreements." *Tax Notes Today*, Oct. 24, 2012.

[11] *See* Announcement 2012-42 and Jamie Arora, "New FATCA Timelines Increase Conformity Between Regs, Intergovernmental Agreements." *Tax Notes Today*, Oct. 25, 2012.

Isle of Man Seeks Agreement to Prevent Tax Evasion by U.S. Taxpayers

On October 16, the U.S. and the Isle of Man, a self-governing British Crown island located off the coast of England, long believed to be a tax haven, announced that they have agreed to revise their tax information exchange agreement, originally executed on October 3, 2002.[12] The impetus for the announcement appears related to the Isle of Man's desire for a model IGA with the U.S. to mitigate the anticipated burden FATCA will have on its financial institutions.[13]

Earlier this year five European Union member states, France, Germany, Italy, Spain, and the U.K., announced that they had agreed with the U.S. to a framework to allow FFIs to report the necessary account information to their respective governments rather than directly to the U.S. Japan and Switzerland also have declared recently that they intend to pursue IGAs with the U.S. to facilitate the implementation of FATCA. On July 26, 2012, the U.S. Treasury Department published a model IGA to improve international tax compliance and to implement FATCA.

It is likely that the agreement between the U.S. and the Isle of Man will be similar to the agreements between the U.S. and other European governments. By taking the important step of reaching out to the U.S., the Isle of Man has recognized that FATCA represents a significant change in global tax cooperation, which will affect foreign financial businesses required to comply with FATCA.

Any agreement signed with the U.S. will need to be ratified by the Isle of Man's parliament.

— R. Nessler

[12] *See* Ann M. Miller, "Isle of Man, U.S. to Revise TIEA," *Tax Notes Today*, Oct. 22, 2012.

[13] *See* The Foreign Account Tax Compliance Act ("FATCA"), which added § 6038D (requiring reporting any interest in assets over $50,000) and § 1298(f) (requiring shareholders of passive foreign investment companies to report certain information). Notice 2011-53 provides the phase-in timeline of key FATCA implementation dates.

IRS May Reassess Use of Step Transaction Doctrine to Stock-for-Debt Exchanges in Leveraged Spinoffs

The IRS has indicated that it may reassess whether the step transaction doctrine should be applied to stock-for-debt exchanges used in leveraged spinoff transactions.[14] The IRS has generally required taxpayers to make a "5-14 representation" in recent private letter rulings. Under a 5-14 representation, an investment bank or other intermediary agrees that it will acquire the debt used in a stock-for-debt exchange at least five days prior to entering into the exchange agreement and it will hold the debt for at least fourteen days before the exchange takes place.

On October 11, William Alexander, an IRS associate chief counsel, stated that although the IRS is not currently reviewing its application of the step transaction doctrine to stock-for-debt exchanges, it may reassess its position given the recent interest in the issue. Stock-for-debt exchanges in leveraged spinoffs have lately become a topic of discussion among tax practitioners because of a private letter ruling released on August 10 that is believed to involve the spinoff of Sara Lee's coffee and tea business.[15]

In PLR 201232014, a distributing company issued new debt directly to third-party investors rather than using an intermediary. The ruling included representations that the debt issuance would occur at least five days before the spinoff was declared and the distributing company would wait at least fourteen days after the debt issuance to spinoff the controlled company and deliver the stock to the third-party investors in satisfaction of the debt. The IRS ruled that the transaction would qualify as a tax-free reorganization under sections 355 and 368(a)(1)(D).

Before the 5-14 representation, the IRS had taken the more restrictive position that the distributing company's debt needed to be "old and cold" when a stock-for-debt exchange was used in a spinoff. The 5-14 representation

[14] *See* Amy Elliott, "IRS May Rethink Step Transaction in Stock-for-Debt Exchanges," 137 *Tax Notes* 239, Oct. 15, 2012.

has allowed distributing companies to use newly issued debt in such exchanges, and the IRS has found the 5-14 representation does not violate the step transaction doctrine. This approach has generally received support as the intermediary is subject to real economic risk during the five-day period when there is no legally binding contract with respect to the exchange and during the fourteen-day period when the intermediary is subject to credit risk.

Unlike recent rulings with a 5-14 representation, PLR 201232014 does not involve an intermediary that is subject to economic risk. However, the distributing company's economic risk during the five-day period before the spinoff is declared and the fourteen-day period before the exchange supports the conclusion that the step transaction doctrine should not apply.

-M. Lang

New York Court Upholds Sales Tax on Adult Dance Performance

On October 23, the New York Court of Appeals, in a case of first impression, upheld a determination by the New York State Tax Tribunal that the admission charge and private lap dance performance fees collected from patrons at an adult "juice bar" are subject to state sales tax.[16]

New York State imposes a sales tax on "[a]ny admission charge . . . in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to . . . dramatic or musical arts performance."[17] An admission charge includes the amount paid for admission and service charge for entertainment or amusement or for use of a facility.[18] A "dramatic or musical arts admission charge" is defined as "(a)ny admission charge paid for admission to a theatre, opera house, concert hall, or other place of assembly for a live dramatic, choreographic, or musical performance."[19] Based on this statutory framework, a vast collection of entertainment is subject to sales tax, including, but not limited to, baseball, basketball, and football games, auto races, carnivals, and amusement parks. The lawsuit filed by Nite Movers in suburban Albany, argued that fees for exotic stage and private couch dances are exempt from sales taxes because the dances qualified as a "dramatic or musical arts performance." To qualify as a "dramatic or musical arts performance" the dance routines must be choreographed.

In the Court of Appeals' decision split 4-3, the majority of the court concluded that the dances, both stage and private, did not constitute a "dramatic or musical arts performance" because "performance by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was not a qualifying performance entitled to exempt status."[20] The majority stated that the Legislature's purpose for creating an exception for "dramatic or musical arts performances" was to promote cultural and artistic performances in local communities. Evidently, pole dancing is not cultural and artistic.

The dissent, which included the Chief Judge, found constitutional problems with the majority opinion and noted that the court was drawing a discriminatory distinction between "highbrow dance and lowbrow dance that is not to be found in the governing statute."[21] According to the dissent, the statutory word "choreographic" simply means "dance," which includes all dance routines no matter what kind of dancing is being done. In closing, the dissenting stated:

> Like the majority and the Tribunal, I find this particular form of dance unedifying – indeed, I am stuffy enough to find it distasteful. Perhaps for similar reasons, I do not read Hustler magazine; I would rather read the New Yorker. I would be appalled, however, if

15 *See* Amy Elliott, "ABA Meeting: Sarah Lee's Leveraged Spinoff Ruling Breaks New Ground," 136 Tax Notes 1542, Sept. 24, 2012.

16 See *In the Matter of 677 New Loudon Corp. v State of New York*, No. 157, slip op. (Oct. 23, 2012).

17 § 1105(f)(1).

18 § 1101(d)(2).

19 § 1101(d)(5).

20 *In the Matter of 677 New Loudon Corp. v State of New York*, No. 157, slip op. at 5 (Oct. 23, 2012).

21 *In the Matter of 677 New Loudon Corp. v State of New York*, No. 157, slip op. at 4 (Dissenting op.) (Oct. 23, 2012).

the State were to exact from Hustler a tax that the New Yorker did not have to pay, on the ground that what appears in Hustler is insufficiently 'cultural and artistic.' That sort of discrimination on the basis of content would surely be unconstitutional (*see Arkansas Writers' Project, Inc. v. Ragland*, 481 US 221, 229-230 [1987]). It is not clear to me why the discrimination that the majority approves in this case stands on any firmer constitutional footing.

— R. Nessler

Shearman & Sterling's Tax Controversy Practice

Shearman & Sterling's Tax Controversy and Litigation practice is centered on large-case tax controversy examinations, tax litigation matters, and government investigations. Our prominent team of nationally recognized trial lawyers represents taxpayers at the audit and appeals stages before the Internal Revenue Service and litigates on behalf of taxpayers in the federal courts, from the U.S Tax Court to the Supreme Court of the United States. Shearman & Sterling's tax lawyers also represent clients in obtaining rulings from tax authorities and in competent authority proceedings and work with clients to obtain advance pricing agreements.

In addition, our tax lawyers are active members of the American Bar Association Section of Taxation ("ABA Tax Section"), the New York State Bar Association Tax Section ("NYSBA Tax Section"), the Wall Street Tax Institute, and the Institute of International Bankers. One partner recently served as chair of the NYSBA Tax Section; another recently ended his term as Chair of the ABA Tax Section's Court Practice and Procedure Committee. Our tax controversy lawyers frequently participate in panels at tax law conferences and publish articles regarding significant tax controversy and litigation developments. Shearman & Sterling was just named "2012 Americas Banking Tax Firm of the Year" at the seventh annual *International Tax Review (ITR)* International Tax Awards.

To ensure compliance with the requirements of Treasury Department Circular 230, any tax advice contained in this newsletter is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing, or recommending to another party any matter(s) addressed herein.

This newsletter is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your usual Shearman & Sterling representative or any of the following:

Laurence M. Bambino
+1.212.848.4213
lbambino@shearman.com

Roger J. Baneman
+1.212.848.4894
rbaneman@shearman.com

Peter H. Blessing
+1.212.848.4106
pblessing@shearman.com

Laurence E. Crouch
+1.650.838.3718
lcrouch@shearman.com

Kristen M. Garry
+1.202.508.8186
kgarry@shearman.com

Craig Gibian
+1.202.508.8034
cgibian@shearman.com

Alfred C. Groff
+1.202.508.8090
agroff@shearman.com

Lawrence M. Hill
+1.212.848.4002
lawrence.hill@shearman.com

Thomas D. Johnston
+1.202.508.8022
thomas.johnston@shearman.com

Don J. Lonczak
+1.202.508.8080
dlonczak@shearman.com

Douglas R. McFadyen
+1.212.848.4326
dmcfadyen@shearman.com

Mitchell E. Menaker
+1.212.848.8454
mitchell.menaker@shearman.com

Robert A. Rudnick
+1.202.508.8020
rrudnick@shearman.com

Michael B. Shulman
+1.202.508.8075
mshulman@shearman.com

John M. Sykes III
+1.212.848.8666
jsykes@shearman.com

D. Kevin Dolan
+1.202.508.8016
kevin.dolan@shearman.com

Jeffrey A. Quinn
+1.202.508.8000
jeffrey.quinn@shearman.com

Ian C. Friedman
+1.202.508.8012
ian.friedman@shearman.com

Richard J. Gagnon Jr.
+1.202.508.8189
rgagnon@shearman.com

Ethan D. Harris
+1.202.508.8163
ethan.harris@shearman.com

Sanjeev Magoon
+1.202.508.8181
smagoon@shearman.com

Richard A. Nessler
+1.212.848.4003
richard.nessler@shearman.com

Ansgar A. Simon
+1.212.848.8781
ansgar.simon@shearman.com

Gerald M. Feige
+1.202.508.8115
gerald.feige@shearman.com

Judy Fisher
+1.202.508.8067
judy.fisher@shearman.com

Douglas Jones
+1.212.848.8067
douglas.jones@shearman.com

Derek Kershaw
+1.212.848.7964
derek.kershaw@shearman.com

Elizabeth A. McGee
+1.212.848.4005
liz.mcgee@shearman.com

Daniel B. Smith
+1.212.848.7139
daniel.smith@shearman.com

Nathan Tasso
+1.202.508.8046
nathan.tasso@shearman.com

Jeffrey B. Tate
+1.202.508.8084
jeffrey.tate@shearman.com

Nell Beekman
+1.212.848.5108
nell.beekman@shearman.com

Mary Jo Lang
+1.202.508.8175
maryjo.lang@shearman.com

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069 | WWW.SHEARMAN.COM

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