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State & Local Tax Advisory

FEBRUARY 21, 2023

Foreign Businesses Meet the Wild, Wild World of SALT – Part 2

By Amy Nogid

This article first appeared in *State Tax Notes* and *Tax Notes International.*

This is Part 2 of an article addressing some of the state and local tax issues faced by foreign businesses venturing into the United States. Part 1[1] discussed some of the sources for the rules to which non-U.S. businesses are subjected (income tax treaties and the IRC), some federal constitutional provisions that apply to non-U.S. businesses (the supremacy clause and the foreign commerce clause), threshold taxability issues (nexus and P.L. 86-272), and some quirky local taxes that take foreign businesses by surprise. This part will focus on income inclusion issues (worldwide combination, extraterritorial income, and apportionment) and potential restraints on the ability to collect tax judgments from non-U.S. entities (the revenue rule).

Income Inclusion

Foreign corporations that are engaged in a U.S. trade or business or have income subject to U.S. income tax must file federal Forms 1120-F.[2] Federal income tax returns must be filed even if the corporation has either no U.S.-source income that is effectively connected with a U.S. trade or business or no U.S.-source income, and even if all its income is exempt from tax under the IRC or a treaty.[3] Returns may not be required if the tax has been fully paid (withheld) at the source and the foreign corporation has no ECI.[4] Form 1120-F includes a section to report income that is not effectively connected to a U.S. trade or business (NECI). A foreign corporation questioning whether it is required to file a federal return should consider filing a protective Form 1120-F, which will preserve its ability to claim deductions against gross income if it is later determined that it had a filing obligation.[5] Since the IRS is targeting nonfilers and has instituted a Form 1120-F nonfiler campaign,[6] foreign corporations may be wise to file these protective returns.

State statutes of limitation on assessment generally do not begin to run until a tax return — a sufficient one at that — is filed. Generally, a sufficient return is one that: (1) purports to be a return; (2) is executed under penalty of perjury; (3) represents an honest and genuine or reasonable attempt to satisfy the requirements of the tax law; and (4) provides enough information from which a tax can be computed.[7] Foreign corporations that have or may have nexus and opt not to file state returns and bet on falling through the audit cracks need to consider the substantial risks of not filing — that is, all years open for assessment, with interest and possible civil and criminal penalties asserted.

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The inclusion of worldwide income in a non-U.S. corporation's income base (subject to apportionment) in computing its state income tax may also catch non-U.S. companies by surprise. Most foreign countries use a territorial system of taxation in which foreign-source income is exempted from taxation and any corresponding payments of foreign taxes are ignored. After enactment of the Tax Cuts and Jobs Act, the federal income tax shifted a bit from what has been labeled a worldwide system — in which foreign income is included, but credits for foreign taxes paid on that income are allowed — to what has been called a "modified territorial" or hybrid system.[8] Things are more of a hodgepodge on the state side, running the gamut from territorial to worldwide — with many jurisdictions offering alternatives (for example, water's-edge elections) and hybrids. As discussed in Part 1, while states' use of a worldwide approach has been countenanced by the U.S. Supreme Court, the approach is viewed unfavorably by the federal government, foreign governments, and businesses.

It should be noted that combined returns, whether on a water's-edge or worldwide basis, are merely a method of apportionment. Combined reporting should (at least theoretically) not affect nexus determinations for the included entities, but can effectively subject the income of non-taxpayers to tax in certain states that take a *Finnigan* approach (that is, the numerator of the sales factor includes the sales attributable to a state of every member in the combined group, including those that do not have nexus with the state) for determining the numerator of the sales factor,[9] or that take the position that if any member of the group does not have P.L. 86-272 protection, none of the entities of the combined group have that protection.

As readers of Part 1 have undoubtedly gleaned, the state tax realm is fraught with variants, and the notion that combined reporting is not a nexus-creating event is no exception. For example, Wisconsin takes the position that if one member of a combined group has nexus in the state and that nexus is attributable to the combined group's unitary business, all members of the combined group have nexus in Wisconsin.[10] Also, New Jersey recently revised its policy on the treatment of members of a combined group that are claiming P.L. 86-272 protection to determine whether protection exists on an entity-by-entity basis.[11]

For states adopting water's-edge combined reporting, consideration may need to be given to whether other non-U.S. entities can be pulled into a water's-edge combined group with the non-U.S. taxpayer. Some states use (with various iterations) an 80/20 rule, which would omit entities having an apportionment percentage that is greater than 80 percent non-U.S. Note that there are instances in which the apportionment factors used to determine whether the 80/20 rule applies may differ from those used in apportioning income on the tax return.[12] For example, Massachusetts provides that "any member that earns more than 20 per cent of its income directly or indirectly, from intangible property or service-related activities [is required to be included in a water's edge return] . . . but only to the extent of that income and the apportionment factors related thereto."[13]

Further, water's-edge returns may require inclusion of income of members of a combined group that are doing business in a tax haven. And yes, you guessed it — states differ about which jurisdictions constitute tax havens. Generally, states will either list the tax havens by name or provide the indicia that will be used to determine whether a jurisdiction fits the bill. The indicia are generally based on the Multistate Tax Commission's definition of tax haven in its Proposed Model Statute for Combined Reporting.[14] The MTC's definition includes a jurisdiction with no tax or a nominal tax rate on relevant income that:

i. has laws or practices that prevent effective exchange of information with other governments;

ii. lacks transparency;

iii. permits the establishment of foreign-owned entities without requiring a local substantive presence or prohibiting these entities from having commercial impact on the local economy;

iv. explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits; or

v. has created a tax regime that is favorable for tax avoidance.[15]

Most states compute their taxes with federal income tax as their starting point. However, some foreign corporations, even if they file a Form 1120-F, may not have income reported on line 29 (taxable income before net operating loss and special deductions) or line 31 (taxable income or loss after NOL and special deductions) because they lack a permanent establishment, or profits attributable to a PE, are exempt from tax under the treaty, or only have NECI. A few states have addressed the issue of whether a foreign corporation that has no ECI and thus no federal reportable taxable income is required to file state corporate income tax returns. For example, a Canadian corporation that conceded that it was doing business in Georgia, but lacked a PE and thus had no profits attributable to a PE and no federal taxable income, could still be subject to Georgia corporate income tax if it had any additions to federal taxable income and that income is allocated or apportioned to Georgia.[16] Pennsylvania requires a corporation that is not subject to federal tax because of a treaty to report income that would have been reported if the income had not been exempted.[17] Oregon will not exclude from tax a foreign corporation exempt from federal income tax under a U.S. treaty unless the treaty contains a provision exempting the foreign corporation from state taxes "upon or measured by net income."[18]

Massachusetts takes the position that corporations that have no ECI and no U.S.-source NECI — and thus no federal gross income — are not subject to the net income measure of the corporation excise, but will still be subject to the non-income measure of the corporation excise or the minimum excise.[19] Massachusetts has also provided guidance on how non-U.S. corporations are to be treated for combined and separate reporting purposes when they have treaty-exempt income.[20] That technical information release provides that "a non-taxable corporation can be included in a combined group even if all of its income is exempt from federal income tax pursuant to the terms of a bilateral U.S. income tax treaty." But the release further states that the addback and arm's-length pricing provisions could be applied to adjust a non-U.S. corporation's Massachusetts income even when the corporation has no federal taxable income under a treaty.[21]

New Jersey has long sought to tax NECI under its corporation business tax, but that position has now been rejected several times by the New Jersey Tax Court, and it appears that the state has retreated from its position.[22, 23] The starting point for computing a company's corporation business tax liability is the taxpayer's federal Form 1120, line 28, or a foreign taxpayer's federal Form 1120F, line 29 ("taxable income before NOL deductions and special deductions"). Excluded from those lines is income that is NECI. Further, like most states, there are statutory adjustments (both additions and subtractions) to federal income, but the addback provisions in the statute, NJSA section 54:10A-4(k)(2)(A) to (J), did not require that NECI be added back. However, the Division of Taxation had argued that entire net income included income from sources both within and without the United States, relying on NJAC 18:7-5.2(a)(1)(xi), its regulation that says foreign-source income must be added back to determine New Jersey entire net income and that nonstatutory adjustments to federal taxable income were permitted.

While New York had long taken the position that it could require a non-U.S. corporation to adjust its federal taxable income to include worldwide income,[24] after the 2015 overhaul of the state's tax regime, alien corporations are only taxable on ECI as determined under IRC section 882.[25] Moreover, the State Department of Taxation and

Finance has confirmed that even if the foreign corporation has nexus under the state's nexus rules, it will not be considered a New York taxpayer if it lacks ECI.[26]

Other somewhat common provisions in state corporate income tax statutes that may catch foreign corporations unaware and lead to unexpected tax liabilities are the addback provisions — particularly those that require specific deductions attributable to intercompany transactions, such as interest and royalties, to be he taxable income base.

Apportionment

Foreign businesses may not be familiar with formulary apportionment, the method used by most U.S. states. In the international arena, separate accounting is generally used with reliance on transfer pricing to address income shifting. However, in the U.S. subnational arena, formulary apportionment has long been the mainstay for multistate businesses to apportion their income, although the formulary factors have shifted over time from the standard three-factor formula (sales/receipts, property, and payroll) to the use by most states of a market-based single sales factor.[27]

Many moons ago, as part of the legislation that enacted P.L. 86-272, Congress mandated that the U.S. House Judiciary Committee and the U.S. Senate Finance Committee study state and local taxation of interstate commerce and propose legislation to address how Congress should best exercise its powers under the commerce clause to regulate interstate commerce. An exhaustive study was conducted, and on September 2, 1965, recommendations were issued by the 11-member Special Subcommittee on State Taxation of Interstate Commerce, chaired by U.S. Rep. Edwin E. Willis of Louisiana. The Willis Report made the following recommendations regarding state taxation of non-U.S. corporations:

> In keeping with the basic structure of our Federal system, the Committee is of the view that international tax policy should be formulated by the Federal Government and not by individual States. Therefore, with respect to income earned by corporations which operate either wholly or partially outside the United States, the Committee recommends that State apportionment rules be required to conform to the international policies that have been formulated for Federal income tax purposes.[28]

Needless to say, states did not heed these recommendations. As SALT practitioners know, apportioning income among countries (think states' approaches to IRC section 482) — and their ability to exercise discretion if they believe that the result of the statutory apportionment formula does not result in a proper reflection of the income generated by the business in the state — is anything but consistent. The permutations (for example, three factor, single factor, and weighted factors), nuances, and idiosyncrasies of state apportionment — and some states' quests to grab a slice of income not properly attributable to instate business operations — may leave foreign companies scratching their heads or skittish about expanding into the United States.

For example, New Jersey has attempted to increase its tax take from non-U.S. companies by applying its throwout rule to exclude from the denominator of its sales factor sales made from business locations in foreign countries to customers in foreign countries where the taxpayer was not subject to tax.[29] Illinois recently promulgated revisions to a regulation providing that businesses exempt from foreign taxation because of treaty provisions will not be required to apply throwout (exclusion from the taxpayer's sales-factor denominator) or throwback (inclusion in the taxpayer's sales-factor numerator) of receipts attributable to such treaty-protected income.[30] Foreign entities are sometimes faced with unfair results. For example, a corporation that owned timberland reserves in Maine and had Maine sales but had no other property, payroll, or sales in the United States was not permitted to include worldwide property, payroll, or sales in its apportionment-factor denominators.[31]

Revenue Rule

Generally, foreign judgments are presumptively valid and enforceable in the United States.[32] But when the judgment relates to tax obligations owed to a foreign nation, the common law "revenue rule" comes into play, and the courts of the other nation are under no obligation to enforce the foreign tax judgment.[33]

The genesis of the revenue rule has been ascribed by some to a 1775 English decision in *Holman v. Johnson*.[34] Like some other tax-related cases of historical significance (remember the Boston Tea Party?), this case involved the sale of tea by residents of Dunkirk to a purchaser in Dunkirk who purportedly intended to smuggle the tea into England. The sellers sued the purchaser in England for nonpayment of the purchase price, and the purchaser sought to avoid payment because the sale was illegal in England because duty had not been paid on the tea. While Lord Mansfield stated that "no country ever takes notice of the revenue laws of another," he still concluded that since the transaction was completed in Dunkirk, no English laws had been violated, and that since debt follows the person, it can be recovered in England.

U.S. courts explained that the revenue rule was an exception to comity and served to avoid adverse foreign relations consequences for the forum state. The Supreme Court relied on the Eire High Court of Justice (the Irish High Court), which stated:

> Modern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. . . . So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection.[35]

The Second Circuit stated that U.S. courts should be "wary" of "becoming the enforcer of foreign tax policy," particularly when a treaty between the two nations was in place and did not provide for reciprocal "extraterritorial tax enforcement assistance."[36] The Ninth Circuit also justified applying the revenue rule on reciprocity since the other foreign nation, Canada, invoked it in refusing to recognize U.S. tax judgments.[37]

Former counsel for the MTC recognized that the revenue rule, along with the Uniform Enforcement of Foreign Judgments Act and the Uniform Foreign-Country Money Judgments Recognition Act — one or both adopted by most states — excludes "a judgment for taxes" from foreign judgments entitled to full faith and credit, as a legal barrier to the collection of state use tax judgments issued against noncompliant foreign sellers.[38]

But a foreign business should not rely on the revenue rule to duck U.S. state tax liabilities, since states may find workarounds, such as levying on foreign businesses' assets held by third parties — for example, credit card companies that are facilitating credits transactions.

Food for Thought

Now that the walls that once limited all but the largest foreign businesses from venturing into U.S. commerce have been thoroughly dismantled and businesses worldwide are jockeying for U.S. dollars, foreign businesses need to evaluate and understand their potential tax responsibilities both at the federal and state level. States are becoming savvier at ferreting out nonfilers, including non-U.S. businesses, and foreign businesses that play ostrich with states do so at their peril. Wise businesses will secure professional guidance regarding potential state tax exposure and compliance responsibilities *before* venturing into business in the United States.

[1] *See* Amy F. Nogid, "Foreign Businesses Meet the Wild, Wild World of SALT — Part 1," *Tax Notes State*, Jan. 2, 2023, p. 33.

[2] IRC section 6012(a)(2).

[3] Treas. reg. section 1.6012-2(g)(1)(i). (The 2020 Instructions to Form 1120-F state that "if the corporation does not have any gross income for the tax year because it is claiming a treaty or Code exemption, it must still file Form 1120-F to show that the income was exempted by treaty or Code. In this case, the corporation should only complete the identifying information (including items A through G) at the top of page 1 of Form 1120-F and a statement that indicates the nature and amount of the exclusions claimed. In the case of a treaty exemption, the corporation may complete item W(1) on page 2 of Form 1120-F, which includes completing and attaching Form 8833 [Treaty-Based Return Position Disclosure], if required in lieu of attaching a statement. In the case of a Code exemption under section 883, the corporation must attach Schedule S (Form 1120-F) in lieu of attaching a statement.)".

[4] Treas. reg. section 1.6012-2(g)(2)(i).

[5] Treas. reg. sections 1.882-4(a)(2), (a)(3)(i).

[6] *See* IRS, "Large Business and International Active Campaigns," last updated Nov. 17, 2022.

[7] The sufficiency standards are based on federal precedent. *See, e.g.*, *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) ("Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law"); *Germantown Trust Co. v. Commissioner of Internal Revenue,* 309 U.S. 304 (1940).

[8] *See generally,* Daniel N. Shaviro, "The New Non-Territorial U.S. International Tax System," *Tax Notes Int'l*, July 9, 2018, p. 125.

[9] This approach is based on the California case *In re Finnigan Corp.*, No. 88-SBE-022-A, 1990 WL 15164 (California State Board of Equalization, Jan. 24, 1990). The alternative approach, *Joyce*, only includes the factors of combined return entities if they have nexus. *In re Joyce Inc.*, No. 66-SBE-070 (Cal. BOE, Nov. 23, 1966).

[10] Wis. Stat. section 71.255(5)(a).

[11] *See* New Jersey Treasury, Division of Taxation, "Revision to Division Policy on Combined Groups and P.L. 86-272," last updated Apr. 20, 2022.

[12] *See, e.g.*, California Franchise Tax Board, Ltr. R. 1995-5 (Oct. 13, 1995) ("Inclusion of an entity in a water's edge group under RTC section 25110(a)(3) is based upon the simple average of the payroll, property and sales factors. The calculation of the water's election fee is based in part on the numerator of the sales factor. Neither of these calculations is affected by amendments to RTC section 25128 providing for an apportionment formula which double weights the sales factor.").

[13] Mass. Gen. Laws ch. 63, section 32B(c)(3).

[14] MTC Proposed Model Statute for Combined Reporting, as amended July 29, 2011.

[15] *Id.*

[16] Georgia Department of Revenue, Georgia Ltr. R. No. LR IT-2018-01 (June 20, 2018) ("By virtue of the Treaty, if Company had no gross income effectively connected with the conduct of a trade or business in the United States, then it would have no 'taxable income' for purposes of I.R.C. section 11(a). But Company could still have a positive Georgia taxable net income if there are any additions to federal taxable income required by O.C.G.A. section 48-7-21(b), depending on how the allocation and apportionment provisions of O.C.G.A. section 48-7-31 apply.").

[17] 72 Pa. Stat. Ann. section 10003.11.

[18] Or. Admin. R. 150-317.0050(2).

[19] Massachusetts DOR, "Massachusetts Corporation Excise Treatment of Offshore Investment Companies," TIR No. 17-2 (Feb. 16, 2017), revising and restating TIR 98-6 (Sept. 9, 1998). TIR No. 17-2 focused on offshore investment companies and addressed the repeal of IRC section 864, "the Ten Commandments," the safe harbor activities specified in Treas. reg. section 1.864-2(c)(2)(ii) that if conducted in the United States would not be treated as resulting in it having a principal office and conducting a trade or business in the United States and thus would

not result in ECI. With the amendment of IRC section 864(b)(2)(A)(ii) to eliminate the reference to principal office, offshore investment companies could have their principal office in the United States but not have ECI if their activities in the United States were limited to the 10 administrative activities. The TIR also specified the safe harbor activities of an offshore investment company that would not constitute doing business in the commonwealth.

[20] Massachusetts DOR, "Non-U.S. Corporation With U.S. Income Exempt From U.S. Tax Pursuant to a Bilateral U.S. Income Tax Treaty," TIR No. 10-16 (Apr. 4, 2011). The TIR concludes that ECI and NECI that is U.S.-source income is generally included in determining Massachusetts taxable net income of a combined group member, and income that is neither U.S. source income nor ECI is generally excluded. The TIR also addresses situations in which a non-U.S. corporation is subject to tax in Massachusetts individually and not as a member of a combined group.

[21] *Id.*

[22] *See* Part 1, *supra* note 1, at n.20 and 21, which discuss proposed legislation and the division's May 20, 2022, notice.

[23] *Infosys Limited of India Inc. v. Director, Division of Taxation*, No. 012060-2016 (N.J. Tax Court, Nov. 28, 2017), motion for reconsideration (N.J. Tax Court, Mar. 19, 2018); *I.B.M. Corp. v. Director, Division of Taxation,* 26 N.J. Tax 102 (Tax 2011). Several additional cases are currently pending before the New Jersey Tax Court.

[24] *See, e.g., Reuters Ltd. v. Tax Appeals Tribunal*, 82 N.Y.2d 112 (1993), *In re Infosys Technologies Ltd.*, DTA No. 820669 (N.Y. Tax App. Trib. Feb. 21, 2008); *In re Schlumberger Ltd.*, DTA No. 816620 (N.Y. Div. Tax App. Apr. 13, 2000) (a non-U.S. corporation must add back foreign-source income not included in its federal income tax base in calculating its New York state franchise tax liability); N.Y. Comp. Codes R. & Regs. tit. 20, section 3-2.3(a)(9) (required that non-U.S. corporations were required to add "all income from sources within and without the United States less all allowable deductions attributable thereto, which were not taken into account in computing Federal taxable income").

[25] N.Y. Tax Law section 208(9)(iv). Corporate Tax Reform FAQs provide that "an alien corporation not treated as a 'domestic corporation' under section 7701 of the Internal Revenue Code that has treaty-exempt income is taxable under the Business Corporation Franchise Tax, if such income would be treated, in the absence of the exemption, as effectively connected with its U.S. trade or business and the corporation is subject to tax under New York's nexus rules, listed in Tax Law section 209. In such circumstance, the full amount of the alien corporation's treaty-exempt income must be added back to the corporation's entire net income." New York State Department of Taxation and Finance, "Corporate Tax Reform FAQs," updated Sept. 8, 2022.

[26] *Id.*

[27] The wisdom and constitutionality of the use of a single sales factor to apportion income are dubious, but that is beyond the scope of this article.

[28] Willis Subcommittee Report on State Taxation (Part VI — Recommendations), at 1155.

[29] *See, e.g., AstraZeneca AB v. Director, Division of Taxation,* Dkt. No. 003658-2013.

[30] Ill. Admin. Code tit. 86, section 100.3200(2)(C), effective for tax years ending on or after Dec. 31, 2022.

[31] *Irving Pulp and Paper Ltd. v. Maine State Tax Assessor*, 879 A.2d 15 (Me. 2005).

[32] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[33] *See* William J. Kovatch Jr., "Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule," 22 *Hous. J. Int'l L.* 265 (1999).

[34] 98 Eng. Rep. 1120 (1 Cowp. 341) (1775). It appears, however, that the concept was of an earlier vintage. *See, e.g., The Attorney General v. Ludwydge*, 145 Eng. Rep. 674 (Bunsbury 281) (1729) (recognizing that England had "no jurisdiction over the revenues in Scotland" (at the time the bond given in payment of tobacco duties Scotland was not part of Great Britain)). *See also Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (1779) ("One nation does not take notice of the revenue laws of another.").

[35] *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.*, 268 F.3d 103, 112 (2d Cir. 2001), citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), citing *Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 529 (Ir. H. Ct. 1950), *aff'd*, [1955] A.C. 530 (Ir. S.C. 1951).

[36] *R.J. Reynolds Tobacco Holdings*, 268 F.3d at 113.

[37] *Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979). After this decision, the United States and Canada modified the United States-Canada Income Tax Convention to add a new Article XXVI A, Assistance in Collection, under which they agreed to assist each other in the enforcement of fully determined foreign tax judgments, but the convention does not apply to subnational tax judgments. Convention, Article II.

[38] Brian Hamer, "Authority of States to Collect Taxes From Foreign Sellers," Multistate Tax Commission (Oct. 31, 2018).

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Mary T. Benton
404.881.7255
mary.benton@alston.com

Clark R. Calhoun
404.881.7553
clark.calhoun@alston.com

John L. Coalson, Jr.
404.881.7482
john.coalson@alston.com

Kathleen Cornett
404.881.4445
kathleen.cornett@alston.com

Daniel Dubin
213.576.1156
daniel.dubin@alston.com

Michael M. Giovannini
404.881.7957
michael.giovannini@alston.com

Zachry T. Gladney
212.210.9423
zach.gladney@alston.com

Matthew P. Hedstrom
212.210.9533
matt.hedstrom@alston.com

Kendall L. Houghton
202.239.3673
kendall.houghton@alston.com

Joshua Labat
212.210.9569
josh.labat@alston.com

Maryann Luongo
202.239.3675
maryann.luongo@alston.com

Ethan D. Millar
213.576.1025
ethan.millar@alston.com

Amy Nogid
212.210.9413
amy.nogid@alston.com

Michael T. Petrik
404.881.7479
mike.petrik@alston.com

Tiffany Li Qu
404.881.7272
tiffany.li.qu@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ +1 404 881 7000 ▪ Fax: +1 404 881 7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86 10 85927500
BRUSSELS: Level 20 Bastion Tower ▪ Place du Champ de Mars ▪ B-1050 Brussels, BE ▪ +32 2 550 3700 ▪ Fax: +32 2 550 3719
CHARLOTTE: One South at The Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ +1 704 444 1000 ▪ Fax: +1 704 444 1111
DALLAS: Chase Tower ▪ 2200 Ross Avenue ▪ Suite 2300 ▪ Dallas, Texas, USA, 75201 ▪ +1 214 922 3400 ▪ Fax: +1 214 922 3899
FORT WORTH: Bank of America Tower ▪ 301 Commerce ▪ Suite 3635 ▪ Fort Worth, Texas, USA, 76102 ▪ +1 214 922 3400 ▪ Fax: +1 214 922 3899
LONDON: 4th Floor ▪ Octagon Point, St. Paul's ▪ 5 Cheapside ▪ London, EC2V 6AA, UK ▪ +44 0 20 3823 2225
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ +1 213 576 1000 ▪ Fax: +1 213 576 1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ +1 212 210 9400 ▪ Fax: +1 212 210 9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ +1 919 862 2200 ▪ Fax: +1 919 862 2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ +1 415 243 1000 ▪ Fax: +1 415 243 1001
SILICON VALLEY: 755 Page Mill Road ▪ Building C - Suite 200 ▪ Palo Alto, California, USA 94304-1012 ▪ 650.838.2000 ▪ Fax: 650.838.2001
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