



United States Tax Alert

Notice 2017-36 delays application of Section 385 documentation regulations

On July 27, 2017, the U.S. Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) issued Notice 2017-36, which states the intent of Treasury and the IRS to delay the application of the documentation rules set forth in Treas. Reg. § 1.385-2 (the “Documentation Regulations”) for 12 months such that the rules would apply only to certain interests issued or deemed issued on or after January 1, 2019. Taxpayers may rely on the delay pending the issuance of implementing regulations.

On April 21, 2017, the President issued Executive Order 13789 (“Executive Order”), designed to reduce tax regulatory burdens by instructing the Secretary of the Treasury to review all “significant tax regulations” issued on or after January 1, 2016, submit reports, and follow promptly with concrete action to alleviate the burdens of regulations that meet the criteria outlined in the order.

Pursuant to the Executive Order, Treasury and the IRS issued Notice 2017-38 on July 7, 2017, which identified and requested comments on whether certain regulations, including the final and temporary section 385 regulations, should be rescinded or modified. A final report is required to be submitted to the President by September 18, 2017, recommending “specific actions to mitigate the burden imposed by regulations identified in the interim report.”

The final and temporary section 385 regulations included the Documentation Regulations, which would establish a minimum documentation standard necessary to treat certain interests as debt for all purposes of the Internal Revenue Code. As finalized, the Documentation Regulations were to be effective for such interests issued or deemed issued on or after January 1, 2018.

In response to the concern that taxpayers have continued to raise with the application of the Documentation Regulations, and in light of further actions concerning the final and temporary regulations under section 385 in connection with the review of those regulations, Treasury and the IRS have determined that these concerns warrant a delay in the application of the Documentation Regulations by 12 months. Accordingly, Treasury and the IRS intend to amend the Documentation Regulations to apply only to interests issued or deemed issued on or after January 1, 2019, with taxpayers permitted to rely on the delay pending issuance of regulations.

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