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Tax MACs: A Study of M&A Termination Rights Triggered by Material Adverse Changes in Tax Law

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Abstract

A "Tax MAC" provision—one that triggers termination or other rights upon a material adverse change in tax law—can be crucial to a business deal if a change in tax law would change a party's interest in consummating the deal, particularly at the specified price and on the articulated terms. Tax MAC provisions may be particularly important when taxpayers make business decisions in a political climate like today's, when tax laws could change again, perhaps dramatically, if control of Congress and the White House changes. Yet little has been written about Tax MAC provisions. In response, I studied Tax MAC provisions included in publicly filed M&A agreements from the past five years, focusing on provisions that could trigger termination of the deal if tax laws change adversely. This Article details the findings of that study. Specifically, this Article identifies the key elements of these Tax MAC provisions (*e.g.*, which changes constitute a "change in tax law" for purposes of these provisions, what procedures are used to determine whether the specified material adverse tax law change has occurred, what consequences arise if such a change has occurred, and how the provisions overlap with any provision requiring a general tax opinion in the transaction) and explains the range of approaches taken on each element. This Article's analysis of the deal points of Tax MAC provisions can inform the drafting and negotiation of a wide variety of (even non-M&A-related) contractual provisions that would alter the price, terms, or obligation to continue a transaction if tax laws change. Thus, this Article should be instructive for lawyers seeking to help clients proceed with desirable transactions that might otherwise be stymied by uncertainty about possible future tax reforms. More generally, this Article provides insights both into how contractual provisions are, and can be, used

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to manage deal risk posed by the possibility of future tax law reforms and into deal-making practices when tax laws may change.

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I. Introduction

A tax law change can materially and adversely affect the tax consequences of a pending deal. In response, some merger and acquisition (M&A) agreements include a "Tax MAC" provision—a provision that triggers termination (or other) rights upon a material adverse change in tax law. For example, it was the Tax MAC provision in the acquisition agreement between Pfizer and Allergan that enabled Pfizer to terminate their pending transaction in 2016 after the Treasury Department issued new inversion regulations.[1] Although Tax MAC provisions are not particularly common, they can be crucial in a business deal if a change in tax law would change a party's interest in consummating the deal, particularly at the specified price and on the articulated terms. Tax MAC provisions enable taxpayers to specify which party to a deal bears which consequences that might arise from a possible tax law change: If a tax law change occurs, how will the terms of the deal change? Which party will be obligated to continue with the deal despite the tax law change? And which party will be able to terminate (and under precisely what circumstances)? Thus, taxpayers can use Tax MAC provisions in contracts to allocate tax-transition risk among themselves.[2] Tax MAC provisions and other similar tax-transition, risk-shifting contractual provisions are useful in any situation in which a taxpayer's economic decision is a function of tax law.[3] As a result, these provisions are likely to be increasingly important when taxpayers are making decisions in a political climate like today's when tax laws could change again, perhaps dramatically, if control of Congress and the White House changes.[4]

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[1] Press Release, Pfizer Announces Termination of Proposed Combination with Allergan (Apr. 6, 2016), https://www.pfizer.com/news/press-release/press-release-detail/pfizer_announces_termination_of_proposed_combination_with_allergan [https://perma.cc/J75U-V89T].

[2] *See generally* Heather M. Field, *Allocating Tax Transition Risk*, 73 TAX L. REV. (forthcoming 2020) (manuscript at 18–30) (on file with author) (also discussing tax-transition, risk-shifting contractual provisions used in derivative agreements, credit agreements, and municipal bond indentures).

[3] *Id.* (manuscript at 30–33).

[4] *Id.* (manuscript at 3, 5, 33, 37).

Yet little has been written about Tax MAC clauses.[5] To help fill this gap, I studied Tax MAC provisions included in publicly filed M&A agreements from the past five years, focusing on provisions that could trigger termination rights if an adverse tax law change occurs. This Article details the findings of that study and provides insights into how Tax MAC clauses are used to manage deal risk posed by the possibility of future tax law changes. Specifically, this Article identifies the key elements of the studied Tax MAC provisions and discusses the range of approaches taken on each. As explained further herein, the Tax MAC provisions vary significantly, including with respect to which changes constitute a "change in tax law" for purposes of these provisions, what adverse consequences constitute Tax MACs (*i.e.*, material adverse tax law changes that trigger the provision's consequences), what procedures are used to determine whether a Tax MAC has occurred, what rights or obligations arise if a Tax MAC has occurred, the extent of overlap between a Tax MAC provision and any general tax opinion required by the agreement, and how a Tax MAC provision is disclosed in relevant SEC filings. Understanding this variability is useful because Tax MAC provisions are, in many circumstances, carefully tailored to the concerns relevant to the particular deal and tend to be employed in large, high-stakes matters. As a result, these provisions present opportunities for nuanced bargaining and value-added lawyering.

This study also has implications beyond the types of deals in which parties might want to terminate a pending acquisition if tax laws change with adverse effect. There are many other situations in which parties might want to use a similarly bespoke tax-transition, risk-shifting provision to manage risks arising from the possibility of future tax law changes.[6] For example, in an acquisition of a private target company, parties might want to contract for a post-closing purchase price adjustment if a tax law change affects the post-acquisition value of a target company's net operating losses. In addition, parties to a loan might want to contract for an adjustment to the loan's interest rate if a tax law change limits the availability or value of interest deductions for the

[5] *See id.* (providing the literature's most comprehensive discussion of Tax MAC provisions outside of this Article but not going into detail about their terms). On the other hand, there is extensive literature, from both academics and practitioners, about "regular" MAC clauses. *See infra* Part II.

[6] There are also contexts in which more standardized tax-transaction. risk-shifting agreements are used, such as in over-the-counter derivatives and syndicated credit agreements, both of which usually require payors to gross-up payees (among other consequences) if tax law changes increase withholding taxes on the payments. *See* Field, *supra* note 2 (manuscript at 21–26). The insights offered in this Article may be useful when revising standardized provisions or when drafting anew a tax-transition, risk-shifting provision that is intended to be standardized across a category of transactions. This Article's insights are, however, likely to be most useful when designing tax-transition, risk-shifting agreements that are bespoke—carefully tailored to the particular transaction and the particular tax issue of concern.

borrower or if a tax law change alters the tax rate applicable to the interest received by the lender.[7] To draft these and similar contractual provisions, the parties (and their lawyers) need to determine which changes should constitute "tax law changes" that could trigger the clause, what adverse consequence should trigger the specified additional payments or other rights, what procedures should be used to determine whether an adverse consequence arises, and more. Thus, this Article's discussion of the key deal points in Tax MAC termination provisions from M&A agreements should also inform the drafting and negotiation of a wide variety of additional provisions that are intended to alter the terms of a contract if tax laws change. More generally, this Article provides insights into both strategies for empowering taxpayers to proceed with desirable transactions that might otherwise be stymied by uncertainty about possible future tax reforms and deal-making practices when tax laws may change.

Part II of this Article provides background on regular (*i.e.*, nontax) MAC clauses, and Part III explains the methodology for this study of Tax MAC provisions. Then, Part IV discusses the findings of the study.

II. Background on MAC Clauses

As deal lawyers know, the overwhelming majority of M&A agreements with delayed closings include a "material adverse change" (MAC) or "material adverse effect" (MAE) provision.[8] These provisions, which this Article refers to as "regular" MAC provisions (as opposed to "Tax" MAC provisions), can confer a termination right (often called a "MAC Out") on one or more parties if a material adverse change occurs after signing but before closing.[9] The ab-

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[7] *See id.* (manuscript at 30–33) (discussing these examples and others and discussing, more generally, that tax-transition, risk-shifting agreements can be useful anytime economic decisions are a function of tax law).

[8] This Article will use the term "MAC" to refer to both "material adverse change" and "material adverse effect" clauses. *See* NIXON PEABODY, NP 2017 MAC SURVEY 4 (Dec. 18, 2017), https://www.nixonpeabody.com/-/media/Files/PDF-Others/mac-survey-2017-nixon-peabody.ashx?la=en [https://perma.cc/NZU7-6YFP] [hereinafter NIXON PEABODY SURVEY] (taking the same approach); Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 330–31 n.3 (2005) (taking the same approach).

[9] NIXON PEABODY SURVEY, *supra* note 8, at 4. *See generally* Gilson & Schwartz, *supra* note 8 (discussing regular MAC provisions); Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007 (2009) (discussing regular MAC provisions); SAMUEL C. THOMPSON, JR., MERGERS, ACQUISITIONS AND TENDER OFFERS: LAW AND STRATEGIES—CORPORATE, SECURITIES, TAXATION, ANTITRUST, CROSS BORDER § 2:12.4 (2010 & Supp. 2019) (same). Another function of the agreement's definition of a "material adverse change" or "material adverse effect" is as a "qualif[ier] to various representations, warranties and covenants." NIXON PEABODY SURVEY, *supra* note 8, at 4.

sence of a MAC is typically a condition to closing the M&A deal, and a termination right generally arises if the closing condition is not satisfied or waived within a given time frame.[10]

Although the exact details of these regular MAC provisions vary because the clauses tend to be heavily negotiated, they generally exclude adverse consequences that arise from changes in laws or regulations (tax or otherwise).[11] The majority also exclude adverse consequences that arise from changes in "interpretation of laws by courts or government entities."[12] As a result, regular MAC provisions are typically of little help to a party concerned about the adverse impact that a possible *tax law change* could have on a deal. If a party wants to be able to exit the transaction upon the occurrence of tax law change that would materially and adversely affect the transaction or the party, a different provision is likely needed. Thus, concerned parties might want a *tax-specific* MAC-like provision to provide explicit termination or other rights if a future tax law change causes a specified adverse consequence. Hence, some deals include *Tax* MAC provisions in addition to regular MAC provisions.

III. Methodology

To find publicly filed M&A agreements with Tax MAC provisions, I used Bloomberg to search EDGAR for plans of acquisition, reorganization, etc.[13] filed within a recent five-year period.[14] Then, I reviewed each agreement to determine if it contained a Tax MAC clause. I culled the duplicate results[15] and many false positives.[16] To focus the study on termination rights triggered

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[10] *See* NIXON PEABODY SURVEY, *supra* note 8, at 4; THOMPSON, *supra* note 9, at § 2:12.4.

[11] For the year 2017, 98% of deals valued at $1 billion or more excluded changes in laws or regulations from their MACs, as did 83% of all deals surveyed. NIXON PEABODY SURVEY, *supra* note 8, at 11 ("[T]his MAC exception has consistently appeared in more than 80% of the agreements reviewed in each of the [preceding] five years.").

[12] *Id.* For the year 2017, 74% of deals valued at $1 billion or more excluded changes in interpretation of laws by courts or government entities from their MACs, as did 57% of all deals surveyed. *Id.* The percentage of all deals reviewed with this exception was down slightly in 2017, as compared to 2016 (59%), 2014 (65%), and 2013 (62%). *Id.*

[13] I searched items attached to an SEC filing as an Exhibit 2. *See* 17 C.F.R. § 229.601 (requiring the filing of exhibits to SEC filings in accordance with "the number assigned to it in the exhibit table" and including an exhibit table that provides that a "plan of acquisition, reorganization, arrangement, liquidation or succession" should be designated as an Exhibit 2 to the relevant SEC filing).

[14] The initial five-year search period covered May 23, 2014, to May 23, 2019. This search yielded 164 results. A subsequent search through February 5, 2020, yielded another 22 results. The search query was "tax N/3 adverse N/3 change" OR "tax N/3 law N/3 change" OR "tax change."

[15] Duplicate results arose when more than one party to an agreement was required to file or where amended versions of agreements were filed.

[16] The most common false positives were agreements that (1) imposed covenants obligating the parties to report/handle tax matters consistently with past practice or the intended tax treatment

by a tax law change, I also set aside agreements in which the provision imposed mandatory consequences (*e.g.*, gross-up payments) arising from a change in tax law but could not lead to a unilateral termination right.[17]

Of the unique agreements from the search period in which a Tax MAC could potentially lead to a termination right, 13 clearly provided a unilateral termination right upon the occurrence of a Tax MAC (*i.e.*, a "Tax MAC Out"), either through an explicit clause in the agreement's termination section or via a closing condition, which, if not satisfied by a particular date, would allow for a termination right.[18] These agreements, listed in Appendix A, were the focus of my analysis.[19] I do not claim, however, to have found every publicly filed M&A agreement from the last five years with a Tax MAC

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of the transaction *except* as required by a change in tax law or both or (2) included the search terms but the punctuation made it clear that the search terms were part of different clauses. False positives also arose for a variety of other reasons, including provisions that (1) provided an exception to tax indemnity obligations if a claim arose from a change in tax law; (2) specified whether the agreement's references to "tax law" took into account any tax law changes arising after the date of the agreement; (3) excluded changes that arose from a change in tax law from a representation that there had been no material changes on a particular issue since a particular date; and (4) excluded from the regular MAC/MAE definition any material adverse effects arising from a change in tax law.

[17] *See, e.g.*, Assignment Agreement by and among Jazz Pharmaceuticals International II Limited, Sigma-Tau Pharmaceuticals Inc., Jazz Pharmaceuticals PLC, and Gentium S.P.A., § 2.7(b)(i), at 9–10 (July 1, 2014), https://www.sec.gov/Archives/edgar/data/1232524/000119312514295844/d768395dex21.htm [https://perma.cc/SNE7-542Q] (requiring gross-up payments if a change in tax law increased the amount of certain taxes deducted from certain ongoing payments).

[18] Three agreements with Tax MAC Out provisions were found in the bring-down period after the original five-year search period. *See supra* note 14. One of those agreements involved a party (Ashford Inc.) that was also involved in two agreements with Tax MACs from the original search period (one from 2015 and one from 2018). The relevant provisions in the later agreement (from 2019) were substantially similar to those in the second agreement (from 2018). Considering the 2019 agreement separately would add virtually nothing to the analysis provided based on the original results. Thus, this Article does not discuss the 2019 Ashford Agreement. The two other agreements with Tax MAC Outs found during the bring-down period were duplicates of the McKesson/Change Healthcare Agreement from 2016, which was found in the original search. The 2016 McKesson/Change Healthcare Agreement was included as an exhibit to two 2020 filings because McKesson was planning to undertake a split-off or spin-off of the joint venture formed pursuant to the 2016 Agreement, to be followed by a merger of the split-off or spun-off company with Change Healthcare. *See* Change Healthcare Inc., Registration Statement (Form S-4) 26–31 (Feb. 4, 2020), https://www.sec.gov/Archives/edgar/data/1756497/000119312520023378/d826474ds4.htm [https://perma.cc/NXS2-6DX2] (summarizing the planned 2020 transactions and their relationship to the transaction effectuated pursuant to the 2016 Agreement); PF2 SpinCo, Inc., Registration Statement (Form S-4) 26–31 (Feb. 4, 2020), https://www.sec.gov/Archives/edgar/data/1790930/000119312520023439/d804285ds4.htm [https://perma.cc/VDW9-CG8Y] (summarizing the planned 2020 transactions). Because these two agreements are duplicates of an agreement already analyzed, this Article does not address them separately.

[19] For agreements listed in the appendices, citations herein will use the short form titles of the agreements, as listed in the appendices.

Out. Because these provisions do not employ standardized language, the search may have missed some. Nevertheless, the agreements identified should provide a sample that is comprehensive enough to determine how these provisions are (and could be) drafted, the variables on which they differ, and the range of approaches taken on each variable.

The Tax MAC provision contained in several other agreements, listed in Appendix B, did not provide a termination right but merely obligated the parties to exert some level of effort to restructure the transaction in response to a change in tax law.[20] Under these provisions, the failure to comply with the covenant to exert the requisite level of effort to restructure could lead to a unilateral termination right, but the mere existence of a material adverse tax law change did not.[21] In some cases, these provisions were quite explicit that, if a Tax MAC occurred and the parties were unable to restructure after exerting the required effort, the tax law change did *not* entitle any party to terminate unilaterally.[22] The parties remained obligated to consummate the transaction unless the transaction was terminated pursuant to another termination provision (*e.g.*, mutual consent). Consequently, a party to the agreement bore real risk that it would not be able to terminate the transaction if a materially adverse tax law change occurred prior to closing.[23] Although these provisions could ultimately lead to a Tax MAC-related termination right (*i.e.*, if a party failed to exert sufficient effort to restructure as required by the agreement), such a right was rather attenuated. Thus, for purposes of the analysis discussed herein (a portion of which examines the termination provisions themselves), I focused primarily on the 13 agreements with Tax MAC Outs, referring to the Tax MAC *restructuring* provisions only when they provided additional insights beyond those provided by the Tax MAC Outs.

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[20] *See, e.g.*, Wright Medical/Tornier Agreement, § 2.14, at 22. One agreement contains both a Tax MAC Out (relating to the transaction's tax treatment under sections 351, 367, and 368) and a Tax MAC restructuring provision (relating to section 7874) that required the parties to take certain steps to adjust the transaction to avoid the adverse result under section 7874, but which did not, even if the adverse effect remained after such effort, trigger a unilateral termination right. *See* Amcor/Bemis Agreement, §§ 7.1, 8.1(d), 8.1(j), at 71, 73, 74, and Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (allowing unilateral termination by either party if a tax law change prevented the satisfaction of conditions related to sections 351, 367, and 368, but allowing termination only by mutual consent if an adverse tax law change prevented the parties from obtaining specified assurance on whether New Holdco would be classified as a foreign or domestic corporation for U.S. federal income tax purposes). This Article's discussion of that agreement generally focuses on the Tax MAC Out portion of the agreement.

[21] *See, e.g.*, Wright Medical/Tornier Agreement, §§ 7.02(b), 7.03(b), 8.01(b)(i), 8.01(c)(i), at 80–83.

[22] *See, e.g.*, Polycom/Mitel Agreement, § 7.13, at 109–10.

[23] Again, the parties could agree to restructure or the parties could terminate pursuant to some other provision (*e.g.*, mutual consent), but the occurrence of the Tax MAC did not, by itself, provide for a termination right.

IV. Analysis of Results

The 13 agreements with Tax MAC Outs vary considerably. These transactions involved companies in widely varying industries, including pharmaceuticals, software, gas/energy, and leisure/entertainment. Some transactions were mergers of equals,[24] but in others, there was a significant disparity between the sizes of the companies.[25] The agreements were signed throughout the five-year search period, with three signed in 2015, one signed in 2016, five signed in 2017, and four signed in 2018. Three deals failed to close, but the Tax MAC Out was the reason for termination in only one of those deals (Pfizer/Allergan).[26] Only one set of parties (Ashford Inc. and related enterprises and individuals) was involved in more than one deal with a Tax MAC Out—one deal signed in 2015 but did not close, and one signed in 2018, which did close. Nineteen different law firms (almost all Am Law 100 firms) advised on these deals, with only two firms (Kirkland & Ellis LLP and Cleary Gottlieb Steen & Hamilton LLP) advising on as many as three different deals and four other firms advising on two deals each.

The substantial similarity of the language used in a few of the Tax MAC Out provisions strongly suggests that these few provisions have common origins.[27] The language similarities, together with the timing of the agreements,

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[24] *See, e.g.*, Press Release, Linde plc Announces Satisfaction of Final Conditions to Close Business Combination between Linde AG and Praxair (Oct. 22, 2018), https://www.linde.com/en/news-media/press-releases/2018/linde-plc-announces-satisfaction-of-final-conditions-to-close-business-combination-between-linde-ag-and-praxair [https://perma.cc/328U-3WDY] (describing the transaction as a "merger of equals").

[25] *See, e.g.*, Press Release, Ensco plc to Acquire Atwood Oceanics, Inc. (May 30, 2017), https://www.businesswire.com/news/home/20170530005599/en/Ensco-plc-Acquire-Atwood-Oceanics [https://perma.cc/2XSN-2VS5] (explaining that the deal was an all-stock transaction after which "Ensco and Atwood shareholders will own approximately 69% and 31%, respectively, of the outstanding shares of Ensco plc").

[26] Ashford's 2015 transaction did not close. *See* Ashford Inc., Current Report (Form 8-K) (March 24, 2017), https://sec.report/Document/0001604738-17-000020/ainc2017remington8-k.htm [https://perma.cc/SE32-4KKA] (explaining that the agreement was terminated because the Service would not issue a private letter ruling, the receipt of which was a condition to the closing of the transaction). The Clariant/Huntsman transaction also did not close. *See* Press Release, Clariant and Huntsman Jointly Decided to Abandon Planned Merger of Equals (Oct. 27, 2017), https://www.clariant.com/en/Corporate/News/2017/10/Clariant-and-Huntsman-jointly-decided-to-abandon-planned-Merger-of-Equals [https://perma.cc/M59B-ASMV] (explaining that the transaction was terminated due to activist shareholder activity that created "too much uncertainty as to whether Clariant will be able to secure the two-thirds shareholder approval that is required to approve the transaction under Swiss law"). The Pfizer/Allergan transaction did not close because Pfizer terminated pursuant to a Tax MAC Out provision. *See* Pfizer, *supra* note 1.

[27] For example, the definitions of an "Adverse 7874 Tax Law Change" in the Ensco/Atwood Agreement and the Clariant/Huntsman Agreement were identical other than a different level of certainty required and a difference in whether an opinion was required to establish that the Tax

also suggests that the language in some of the agreements may be traceable from one deal to the next, often (but not always) through law firms that advised on multiple deals.[28] Yet, even when a law firm was involved in multiple deals, the Tax MAC provisions in those deals could be very different.[29]

Ultimately, notwithstanding some language similarities among a couple of subsets of agreements, there is quite a bit of variation in the details of the Tax MAC Out provisions themselves, as explained further below.

MAC provision had been triggered. *See* Ensco/Atwood Agreement, § 8.15, at 79; Clariant/Huntsman Agreement, § 9.5, at 78. Those definitions were substantially similar to the definition of "Adverse Tax Law Change" in the Pfizer/Allergan Agreement. *See* Pfizer/Allergan Agreement, § 9.5, at 100–01. All of those definitions were also quite similar to the definition of "Tax Law Change" in the Amcor/Bemis Agreement, except that the Amcor/Bemis Agreement's Tax MAC was more general because it did not identify a single Code section that, if changed, would be particularly concerning to the parties. *See* Amcor/Bemis Agreement, § 9.5, at 91. Additionally, the Tax MAC provisions in the Ashford 2015 Agreement and the Ashford 2018 Agreement were quite similar to each other, although quite different from the Tax MAC provisions in other agreements. *See* Ashford 2015 Agreement, Article I, at 2, § 10.01(b)(vii), 10.01(c)(vi), at 86, 87; Ashford 2018 Agreement, Article I, at 2–3, § 10.01(b)(vii), 10.01(c)(vi), at 81, 82.

[28] One version of a Tax MAC provision can likely be traced (1) from the Pfizer/Allergan Agreement signed in 2015, on which Wachtell, Lipton, Rosen & Katz and Cleary Gottlieb Steen & Hamilton LLP advised, (2) to the Clariant/Huntsman Agreement signed in 2017, on which Cleary Gottlieb Steen & Hamilton LLP and Kirkland & Ellis LLP advised, and (3) to the Amcor/Bemis Agreement signed in 2018, on which Cleary Gottlieb Steen & Hamilton LLP and Kirkland & Ellis LLP, again, advised. The Tax MAC provision in the Ensco/Atwood Agreement from 2017 (on which Latham & Watkins LLP and Gibson, Dunn & Crutcher LLP advised) is so similar to the other three that, although no overlapping law firms were involved, the Tax MAC provision must have been based on either the Pfizer/Allergan Agreement or the Clariant/Huntsman Agreement (the Amcor/Bemis Agreement was later). In addition, the similarity between the Ashford 2015 and Ashford 2018 Tax MAC Out provisions is not surprising because overlapping parties (Ashford and several related parties) and overlapping counsel (Norton Rose Fulbright US LLP and Baker Botts LLP) were involved in both Ashford transactions.

[29] *Compare* INC Research/inVentiv Agreement, § 6.1(g), at 80 (specifying the change that would trigger the Tax MAC clause) *with* Linde/Praxair Agreement, Annex I, at A-1, A-1-9 (defining "Adverse Tax Event" and "Tax Law Change") (Sullivan & Cromwell LLP advised on both). *Compare* Pfizer/Allergan Agreement, §§ 8.1(i), 9.5, at 92, 100–01, (defining "Adverse Tax Law Change"), *with* Harman/Symphony Agreement, § 12.01, at 91–92 (defining "Material Adverse Effect," which integrated the Tax MAC provision into the regular MAC provision) (Wachtell, Lipton, Rosen & Katz advised on both). Of course, just because a single firm advised on multiple matters does not mean that the same lawyers advised on the particular provisions. Thus, the differences in approach could be attributable to the involvement of different lawyers, among a myriad of other possible explanations.

A. *What Tax Concerns Led Parties to Include Tax MAC Outs in Their Agreements?*

The Tax MAC Out provisions evinced concerns about a wide range of tax issues, and some deals included Tax MAC Outs on multiple issues.[30] Inversions were a common focus of these clauses; five of the 13 deals were contingent on the absence of tax law changes that would cause a post-transaction party to be treated as U.S. domestic corporation, rather than a foreign corporation, for U.S. federal income tax purposes.[31] Five other deals reflected the parties' concern that tax law changes could prevent the transaction from qualifying as a section 368 reorganization or as an exchange under section 351 (or could lead to material gain recognition in a qualifying transaction) or both.[32] The Tax MAC Out in one of these deals was also contingent on the absence of tax law changes that could result in recognition of gain under section 367(a).[33] The Tax MAC Outs in two of these deals also involved tax law changes that could cause certain dividends not to be qualified dividends.[34] One deal involved Tax MAC Outs related to tax-free treatment under section 721, the application of the partnership disguised sale rules, and a section 355

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[30] *See, e.g.*, McKesson/Change Healthcare Agreement, §§ 1.01, 9.01(a)(iv)–(vi), at 9, 19, 22, 98–99 (providing definitions of "Echo 721 Tax Opinion," "MCK 721 Tax Opinion," and "Section 355(e) Tax Opinion" as related to Tax MAC Outs concerning tax issues under section 721, partnership disguised sales rules, and section 355). Because some deals involved multiple Tax MAC Outs on multiple issues, the number of deals referenced in this Part totals more than 13.

[31] Ensco/Atwood Agreement, § 8.15, at 79 (defining "Adverse 7874 Tax Law Change"); Haymaker/One Spa World Agreement, § 1.1, at 9, 19–20 (defining "Change in Tax Law" and "Material Adverse Effect"); Clariant/Huntsman Agreement, § 9.5, at 78 (defining "Adverse 7874 Tax Law Change"); Linde/Praxair Agreement, Annex I, at A-1, A-1-9 (defining "Adverse Tax Event" and "Tax Law Change"); Pfizer/Allergan Agreement, § 9.5, at 100–01 (defining "Adverse Tax Law Change"). Only one of the deals with a Tax MAC Out related to the tax consequences of an inversion was signed during the Obama administration. Three others were signed in the second quarter of 2017, and one signed in 2018 (*i.e.*, after the 2017 Tax Cuts and Jobs Act took effect).

[32] Ashford 2015 Agreement, Article I, at 2, 14–15 (defining "Adverse Tax Change" and "Remington Holder Adverse Tax Change"); Ashford 2018 Agreement, Article I, at 2, 14–15 (defining "Adverse Tax Change" and "PM Party Adverse Tax Change"); Amcor/Bemis Agreement, at 2, and Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (defining and providing a Tax MAC closing condition related to the "Intended Tax Treatment"); INC Research/inVentiv Agreement, § 6.1(g), at 80 (specifying the change that would trigger the Tax MAC clause); PharmAthene/Altimmune Agreement, § 6.3(g), at 75 (specifying the change that would trigger the Tax MAC clause).

As used herein, references to a "section" are to the Internal Revenue Code of 1986, as amended (Code) unless otherwise indicated.

[33] Amcor/Bemis Agreement, at 2, and Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (defining and providing a Tax MAC closing condition related to the "Intended Tax Treatment").

[34] Ashford 2015 Agreement, Article I, at 14–15 (defining "Remington Holder Adverse Tax Change"); Ashford 2018 Agreement, Article I, at 14–15 (defining "PM Party Adverse Tax Change").

Morris Trust issue.[35] And one deal evinced a concern that tax law changes could affect the availability and consequences of the renewable electricity production credit under section 45.[36]

Although almost all the Tax MAC Out clauses identified the specific tax issue of concern, one deal did not.[37] The Tax MAC Out in that deal was more general, reflecting a concern about *any* change in tax law that would have a material adverse effect, as that term was defined in the agreement's regular MAE clause.[38]

B. *What Counts as a "Change in Tax Law?"*

There is surprising variability as to what constituted a "change in tax law" for purposes of triggering the Tax MAC Out provisions. The parties' choices about which types of changes should be deemed as "changes in tax law" presumably reflected their assessments about the ways in which the tax laws that concerned them were most likely to change (*e.g.*, through congressional action, administrative action, or judicial decisions) and their preferences about how complete a change should be (*e.g.*, whether bills, proposals, and changes not yet effective were sufficient) before it could trigger the Tax MAC provision's termination rights. Fundamentally, all of these choices involve risk allocation—which party bears the risks arising from which types of changes in the tax law?

To implement these choices, the agreements reflected several different drafting approaches. Some agreements did not explicitly state which specific changes (*e.g.*, regulations versus judicial decisions) constituted changes in tax law that could trigger the Tax MAC Out, opting instead to rely only on the defined terms "Tax" and "Law" used throughout the agreement (*e.g.*, referring to a "change in Tax Law" when the terms "Tax" and "Law" were defined elsewhere in the agreement).[39] A couple of agreements were even less specific, referring only to a nontax-specific "change in Law" (again using the term "Law," which was defined elsewhere in the relevant agreement) that would have the particular adverse tax impact.[40] On the other hand, some agreements

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[35] McKesson/Change Healthcare Agreement, § 1.01, at 9, 19, 22 (defining "Echo 721 Tax Opinion," "MCK 721 Tax Opinion," and "Section 355(e) Tax Opinion").

[36] NJR Agreement, § 1.1, at 3, 11 (defining "Change in Tax Law" and "Proposed Change in Tax Law"). The deals with Tax MAC restructuring provisions also evinced concerns about possible law changes relating to other specific tax issues, including Nevada business taxes (Lakes Entertainment/Golden Gaming Agreement, § 5.24, at 72), the Irish tax rate (Strongbridge/Novo Nordisk Agreement, § 7.06, at 39–40), and the allocation of partnership debt (NY REIT/JBG Debt Maintenance Agreement, § 2.7, at 9–10).

[37] Harman/Symphony Agreement, § 12.01, at 91–92 (definition of "Material Adverse Effect").

[38] *Id.*

[39] *See, e.g.*, Ashford 2015 Agreement, Article I, at 2 (definition of "Adverse Tax Change").

[40] *See, e.g.*, PharmAthene/Altimmune Agreement, § 6.3(g), at 75.

were more specific about the particular tax law changes (*e.g.*, explicitly addressing whether proposed legislation could trigger the Tax MAC Out), but even those agreements that clearly defined a "Change in Tax Law" (or other similar defined term) often used the agreement's defined terms and, thus, implicitly incorporated their definitions.[41]

1. *Statutes and Bills*

All agreements provided, whether explicitly or via the definitions of Tax or Law or both, that changes to the Code would constitute a change that could trigger the Tax MAC Outs. The majority of agreements referred generically to any "statute" or "code" and did not specifically limit the Tax MAC trigger to a change to a particular Code section or sections.[42] One agreement, however, limited the relevant statutory changes to those that would amend only one specific Code section (section 7874).[43] Thus, that agreement's Tax MAC Out would not be triggered by an amendment to another Code section or the enactment of a new Code section, even if such an amendment or enactment would have resulted in an adverse effect that was substantially similar to one that would otherwise trigger the Tax MAC Out.

The agreements take a less uniform approach to legislative proposals. Some agreements did not mention bills at all and thus excluded any changes that were contained only in bills that had not yet been enacted into law.[44] Under other agreements, a bill would constitute a change that could trigger the Tax MAC Out if the bill had been passed in identical or substantially identical form by both houses of Congress and the time for Presidential signature or veto had not yet elapsed.[45] Other agreements included bills at even earlier stages, including a bill passed by either house of Congress as long as it has not been defeated in the other house;[46] a bill passed by either house of Congress

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[41] *See, e.g.*, Linde/Praxair Agreement, Annex I, at A-1-4, A-1-9 (using the "Law" defined term in the definition of "Tax Law Change"). *But see* Haymaker/One Spa World Agreement, § 1.1, at 9, 19–20 (not using "Tax" or "Law" defined terms in the definition of "Change in Tax Law").

[42] *See, e.g.*, Amcor/Bemis Agreement, § 9.5, at 88, 91 (defining "Law" as referring to any statute or code and "Tax Law Change" as not limited to any specific code section).

[43] Haymaker/One Spa World Agreement, § 1.1, at 9 (defining "Change in Tax Law").

[44] *See, e.g.*, INC Research/inVentiv Agreement, §§ 6.1(g), 9.1, at 80, 101 (defining "Law," a term used in the Tax MAC provision, to refer to provisions "issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity"). If a change was merely reflected in a bill that had not yet been enacted, the statute would not have yet changed.

[45] *See, e.g.*, Clariant/Huntsman Agreement, § 9.5, at 78 (providing, in the definition of "Adverse 7874 Tax Law Change," that "substantially identical" meant in the form "such that a conference committee is not required prior to submission of such legislation for the President's approval or veto").

[46] *See* Linde/Praxair Agreement, Annex I, at A-1-9 (clause (ii) of the definition of "Tax Law Change").

that was reasonably likely to be enacted into law;[47] and even a bill that had merely been reported out of the House Ways and Means Committee or Senate Finance Committee, if it was reasonably likely to be enacted into law.[48] In addition, one agreement provided that even a bill that had been vetoed by the President would constitute a law change that could trigger the Tax MAC Out as long as the period for overriding the veto had not yet elapsed.[49]

2. *Administrative/Regulatory Guidance*

All agreements also included changes to, or issuance of, regulations or subregulatory guidance as changes that could trigger the Tax MAC Outs. In some cases, this was accomplished merely via the definition of the term "Law", which typically included any "rule, regulation, . . . or requirement . . . of any Governmental Authority" or similar language.[50] In other cases, it was accomplished more explicitly in the definition of "Adverse Tax Law Change" (or similar term) or in the Tax MAC Out provision's language itself by including a reference to any "interpretation" of applicable law, sometimes specifically referring to any interpretation "by a taxing authority,"[51] any "official" interpretation,[52] or any interpretation "set forth in published guidance."[53] This sort of specific reference arguably included not only final and temporary regulations but also proposed regulations because even proposed regulations reflect the Treasury Department's (nonbinding) interpretation of the law and proposed regulations are officially issued and published in the Federal Register and Internal Revenue Bulletin.[54] Given that much of the action on inversions had been in the form of regulations, it was not surprising that all of the agreements with inversion-related Tax MAC Outs were explicit that a change to regulations or other administrative guidance constituted a change in tax law that could lead to a termination right.

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[47] NJR Agreement, § 1.1, at 11 (defining "Proposed Change in Tax Law").

[48] *Id.*

[49] Linde/Praxair Agreement, Annex I, at A-1-9 (clause (ii) of the definition of "Tax Law Change").

[50] *See, e.g.*, PharmAthene/Altimmune Agreement, § 9.14, at 98 (defining "Law", which was incorporated into the Tax MAC Out provision in § 6.3(g)).

[51] *See, e.g.*, Ashford 2015 Agreement, Article I, at 2 (defining "Adverse Tax Change").

[52] *See, e.g.*, INC Research/inVentiv Agreement, § 6.1(g), at 80.

[53] *See, e.g.*, Pfizer/Allergan Agreement, § 9.5, at 100–01 (defining "Adverse Tax Law Change").

[54] The drafters of one agreement did, however, feel the need to explicitly provide that "for the avoidance of doubt . . . proposed regulations published in the Internal Revenue Bulletin" count as "Law" that could trigger the Tax MAC Out. *See* Pfizer/Allergan Agreement, § 9.5, at 106 (defining "Law").

Some agreements provided more detail about sub-regulatory guidance. A few agreements explicitly excluded IRS News Releases from possibly triggering the Tax MAC Out.[55] One explicitly *included* "notices described in Section 7805(b) of the Code" as guidance that, if issued or changed, could trigger the Tax MAC Out.[56] In addition, one agreement went into extensive detail about the particular sub-regulatory guidance that could trigger the Tax MAC Out, including a specific reference to memoranda or similar authority issued by the IRS Large Business and International Division or by the IRS Chief Counsel.[57]

The agreements typically did not specify which Code sections such guidance needed to interpret to trigger the Tax MAC Out. One agreement, however, provided that the issuance or change of regulations or other administrative guidance could trigger the Tax MAC Out only if interpreting section 7874.[58] Another agreement included changes to regulations and administrative guidance generally, but specifically *excluded* changes made when finalizing particular proposed regulations from potentially triggering the Tax MAC Out.[59]

3. *Judicial Decisions*

All of the agreements arguably included judicial decisions in the types of changes that could trigger a Tax MAC Out, but most did so implicitly through a Tax MAC Out provision that was drafted using the defined term "Law" (or "Applicable Law"), which was, in turn, defined to include such things as orders, rulings,[60] common law,[61] and judicial interpretations.[62]

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[55] *See, e.g.*, Ensco/Atwood Agreement, § 8.15, at 79 (defining "Adverse 7874 Tax Law Change").

[56] Pfizer/Allergan Agreement, § 9.5, at 100–01, 106 (included in the definition of "Law" ("for the avoidance of doubt"), which was used in the definition of "Adverse Tax Law Change").

[57] NJR Agreement, § 1.1, at 3 (defining "Change in Tax Law" as including "any published IRS guidance, notice, announcement, revenue ruling or revenue procedure, any technical advice memorandum, examination, directive or similar authority issued by the IRS Large Business and International division, and any published advice, advisory, or legal memorandum issued by IRS Chief Counsel, that applies, advances or articulates a new or different interpretation or analysis of any provision of the Code").

[58] Haymaker/One Spa World Agreement, § 1.1, at 9 (defining "Change in Tax Law").

[59] McKesson/Change Healthcare Agreement, § 9.01(a)(v)–(vi), at 98–99 (referring to "Proposed Treasury Regulation sections 1.385-1 through 1.385-4 (or any portion thereof)").

[60] *See, e.g.*, Pfizer/Allergan Agreement, § 9.5, at 106, 110 (defining "Law" to include an "order" or "ruling" by a "Relevant Authority," which included "courts and other judicial bodies" among many other authorities).

[61] *See, e.g.*, Ashford 2018 Agreement, Article I, at 8, 10 (defining "Law" to include "common law" of any "Governmental Authority," which included courts and tribunals).

[62] *See, e.g.*, McKesson/Change Healthcare Agreement, § 1.01, at 2 (defining "Applicable Law").

Thus, taking into account the defined terms, changes to these judicial authorities arguably could trigger the Tax MAC Out in all of the agreements. I say "arguably" because the conclusion that judicial decisions could trigger the Tax MAC Outs in many of these agreements was implicit and relied on the definition of the term "Law." In most agreements, there was nothing that would undermine the conclusion that judicial decisions could be triggering changes. In one agreement, however, the high degree of specificity with which the agreement articulated the types of changes in tax law that could trigger the Tax MAC Out (and which did not include any reference to courts or case law) suggested that the parties might have intended to exclude judicial decisions despite the fact that the "Tax Law Change" provision used the defined term "Law," which did include judgments and orders.[63] This potential ambiguity suggests that parties might want to be explicit about whether (or not) judicial decisions could trigger Tax MAC Outs, particularly if a party is concerned about an imminent judicial decision with potentially adverse implications.

Two agreements were quite explicit that judicial decisions were *included* in the types of changes that could trigger the Tax MAC Out. Both agreements included in the definition of "Change in Tax Law" decisions by federal courts that change the interpretation of the tax law. One specifically listed particular federal courts.[64] The other did not specify particular courts but did limit judicial Tax MAC Out triggers by the substantive topic of the decision.[65] These agreements may provide sample language for anyone wishing to be explicit about whether judicial decisions can trigger a Tax MAC Out.

4. *Proposed Changes*

Except as discussed above regarding bills and proposed regulations that are set forth in published guidance, most agreements were silent regarding whether proposed changes were sufficient "tax law changes" to trigger a termination right. Proposals to change the law are not law, and thus, for most

[63] In the Linde/Praxair Agreement, the definition of "Tax Law Change" was four paragraphs long, covering changes to the Code, certain bills that would change the Code, changes to administrative guidance set out in published guidance, and proposed changes in administrative guidance that had been publicly announced, but did not include any reference whatsoever to courts, the judicial branch, or case law. *See* Linde/Praxair Agreement, Annex I, at A-1-9.

[64] NJR Agreement, § 1.1, at 3 (defining "Change in Tax Law" as including changes by the "U.S. Tax Court, the U.S. Court of Federal Claims, a U.S. District Court, a U.S. Court of Appeals or the U.S. Supreme Court").

[65] Haymaker/One Spa World Agreement, § 1.1, at 9 (defining "Change in Tax Law" and referring only to decisions that "change[] or clarif[y] the interpretation of section 7874 [or the regulations thereunder]").

Tax MAC Outs, the mere proposal of a change would be insufficient to trigger a termination right even if the change (were it to be enacted) would have the specified adverse effect.

One agreement, however, explicitly treated any proposed statutory or regulatory change as a potential trigger for a Tax MAC Out, if the proposed change "has been publicly announced (through whatever media)" by the Service, the Treasury Department, the President, or any other executive agency[66] and would, if "finalized and made effective," have the specified adverse effect.[67] The inclusion of proposed changes could lead to a termination right at a relatively early point when the tax change proposal is rather inchoate and no formal action has been taken to implement the proposal. This approach increases flexibility for, and reduces tax-transition risk borne by, the party that would have the termination right.[68] On the other hand, including proposed changes as a Tax MAC Out trigger increases deal risk for the other parties by reducing the likelihood that the deal will close.[69]

5. *Changes That Are Not Yet Effective*

A handful of agreements also explicitly provided that tax law changes that were not yet effective could also trigger a Tax MAC Out.[70] Without specific language that an enacted-but-still-prospective change counts as a possible trigger, ambiguity about whether such a change is sufficient to trigger the termination right may lead to a dispute.[71] Thus, if parties want the Tax MAC

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[66] Linde/Praxair Agreement, Annex I, at A-1-9 (defining "Tax Law Change" as including "any proposed change in, new official interpretation of, or change in official interpretation of, U.S. Federal tax Law, whether or not such proposed change is yet approved or effective, that has been publicly announced (through whatever media) by the U.S. Internal Revenue Service, U.S. Department of Treasury, President of the United States or other agency, arm or instrumentality of the executive branch of the U.S. Federal government, or any of their agents or designees").

[67] *Id.* at A-1 (defining "Adverse Tax Event").

[68] Of course, a party is not obligated to exercise a termination right.

[69] If parties have aligned preferences about whether to terminate upon the occurrence of a tax law change, then this may not be a problem.

[70] *See, e.g.*, Clariant/Huntsman Agreement, § 9.5, at 78 (including, in the definition of "Adverse 7874 Tax Law Change," both statutory and interpretive changes "whether or not such change . . . is yet effective"); *see also* PharmAthene/Altimmune Agreement, § 9.14, at 98 (using somewhat less explicit language but still stating that "enacted" laws constituted changes in tax laws that could trigger the Tax MAC Out, which implied that it was unnecessary for a law to be effective, as long as it had been enacted).

[71] The resolution of the question would likely depend on the careful parsing of the specific contractual terms. Relevant information could include the verb tense of the Tax MAC Out triggering condition (*e.g.*, causes vs. will cause) and the point in time at which the tax analysis is determined (*e.g.*, when the transaction occurs vs. after the transaction). The former alternatives suggest that the law may need to be presently in effect, or at least in effect as of the time the transaction would occur, whereas the latter language alternatives are more open ended and could contemplate an adverse effect that arises only at some point in the future when the change becomes effective.

Out to be triggered by a change in law even if that change has a delayed or phased-in effective date, they should make their intention explicit.

6. *Specifying What Counts as a "Change in Tax Law"*

Ultimately, when drafting a Tax MAC Out, it may be useful to specify whether and under what conditions bills, other proposed changes, sub-regulatory guidance, judicial decisions, and changes that are not yet effective ought to entitle a party to terminate. Of course, the importance of specificity depends on the form in which a tax law change of concern is most likely to be made, which will vary depending on the tax issue of concern.

C. *How Is the Tax MAC Out Triggered?*

After identifying the tax issue of concern and determining whether a change in tax law has occurred, the next step is to ascertain whether the tax law change caused the specified adverse tax consequence (*i.e.*, whether the Tax MAC Out is triggered). Whether the Tax MAC Out is triggered depends on, among other things, how the trigger is phrased, the level of confidence that the trigger has occurred, and the procedures for determining whether the Tax MAC Out has been triggered.

1. *How Is the Trigger Phrased?*

Different agreements phrase the Tax MAC Out trigger differently. Phrasing approaches that were found among the agreements included the following:

1. A change in tax law has occurred that would (with some level of confidence) cause the undesired tax treatment.[72]

   Example: A change in tax law has occurred that should cause the parent corporation to be treated as a domestic corporation for U.S. federal income tax purposes.

   If true, the Tax MAC Out is triggered. If false, no trigger.

2. A change in tax law has occurred that would (with some level of confidence) cause the desired tax treatment NOT to result.[73]

[72] *See, e.g.*, Clariant/Huntsman Agreement, §§ 8.1(k), 9.5, at 72, 78.

[73] *See, e.g.*, Linde/Praxair Agreement, § 8.3(b)(iii), Annex I, at 52, A-1 (clause (b) in the definition of "Adverse Tax Event").

Example: A change in tax law has occurred that should cause the parent corporation not to be treated as a foreign corporation for U.S. federal income tax purposes.

If true, the Tax MAC Out is triggered. If false, no trigger.

3. No change in tax law change has occurred that would (with some level of confidence) cause the desired tax treatment not to result.[74]

Example: There has not been tax law change that should cause the parent corporation not to be treated as a foreign corporation for U.S. federal income tax purposes.

If true, no trigger. If false, the Tax MAC Out is triggered.

Phrasings 1, 2, and 3 are functionally equivalent[75] if there are only two possible, mutually exclusive tax treatments—X and not X (*e.g.*, foreign and domestic),[76] although Phrasings 1 and 2 require affirmative conclusions about an identifiable change in law, whereas Phrasing 3 requires a conclusion about the absence of a change, which may be more difficult to establish in some situations.

A somewhat different phrasing was also observed in the agreements reviewed.

4. A change in tax law means that it is not the case that the desired tax treatment would (with some level of confidence) result.[77]

Example: A change in tax law means that it is not the case that the parent corporation should be treated as a foreign corporation for U.S. federal income tax purposes.

If true, the Tax MAC Out is triggered. If false, no trigger.

Phrasing 4 can have a different meaning from Phrasings 1, 2, or 3 because, for example, "it is not the case that the corporation should be treated as a

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[74] *See, e.g.*, PharmAthene/Altimmune Agreement, § 6.3(g), at 75.

[75] This begins to feel like an LSAT logic game.

[76] If there are three possible treatments (A, B, and C), saying "a change in law causes not A" is not equivalent to saying "a change in law causes B," making Phrasings 2 and 3 potentially different from Phrasing 1. In addition, Phrasing 1 would also be potentially different from Phrasings 2 and 3 if the desirable/undesirable options are not mutually exclusive (*e.g.*, "qualify as a reorganization under Section 368" and "recognize a material amount of gain" are not mutually exclusive because a material amount of gain could be recognized in a qualifying section 368 reorganization if there is ample boot).

[77] *See, e.g.*, McKesson/Change Healthcare Agreement, § 9.01(a)(iv), at 98.

foreign corporation" does not mean that "the corporation should be treated as a domestic corporation." The former could merely mean that the corporation is only "more likely than not" to be treated as a foreign corporation (*i.e.*, the same conclusion as the former, just with less than a "should" level of confidence).

This discussion illustrates the fact that there can be subtle differences in the wording of a trigger. Thus, the parties should be very clear about exactly when they want the termination right to be triggered. For example, does the party want to be able to terminate only if there is a less than 50% chance of the desired result? Or does the party want to be able to terminate if there is anything less than a 75% chance of the desired result? Once the parties agree on the situations that will trigger the termination right, the language should be drafted carefully so it captures those precise situations.

2. *How Much Confidence Does the Trigger Require?*

Some of the Tax MAC Out triggers use traditional tax opinion levels to state explicitly how much confidence there must be that the particular triggering tax result has occurred.[78] Some agreements used the word "should" as in the examples in the prior section,[79] others used the phrase "more likely than not,"[80] and one used the word "will."[81] Of course, even the same confidence level can lead to different results depending on how the trigger is phrased,[82] but because these particular confidence levels are well accepted terms of art in the tax practitioner community, their use adds clarity to the Tax MAC Out trigger.

Other triggers use somewhat more ambiguous language. Several used the word "would,"[83] and in those agreements it was not clear whether the parties intended to (1) require a "will" level of confidence (understanding "would" as a different verb tense of "will") or (2) merely use "would" as a conditional verb (*i.e.*, referring to a result that is dependent on the occurrence of a law change) without connoting any particular level of confidence. One agreement that used "would" expressly stated that "would . . . is not intended to specify a particular tax opinion level standard."[84] In these agreements and others that

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[78] *See* Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 312–27 (2011) (describing tax opinion levels).

[79] *See, e.g.*, Amcor/Bemis Agreement, Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (explicitly requiring "a 'should' (or higher) level of comfort").

[80] *See, e.g.*, Ensco/Atwood Agreement, § 8.15, at 79 (definition of "Adverse 7874 Tax Law Change").

[81] INC Research/inVentiv Agreement, § 6.1(g), at 80 ("will not").

[82] *See supra* Part IV.C.1 (illustrating how the use of "should" in two different trigger phrasings can lead to substantively different triggers).

[83] *See, e.g.*, Clariant/Huntsman Agreement, § 9.5, at 78 ("Adverse 7874 Tax Law Change").

[84] Haymaker/One Spa World Agreement, § 1.1, at 9 (definition of "Change in Tax Law").

did not use language that reflected particular tax opinion level standards, it was unclear how certain the particular tax result must have been to trigger the Tax MAC Outs.[85]

If any change in law is expected to have reasonably clear consequences for the tax treatment of the transaction, perhaps this language parsing is irrelevant, and it is unnecessary to specify a level of confidence for the trigger. On the other hand, the less clear cut the results of a change are likely to be, the more contentious a decision to exercise a Tax MAC Out right is likely to be. Consequently, parties might want to include both a specific level of confidence required to trigger the termination right and, as discussed in the next Part, a procedure to determine whether the trigger has occurred with the requisite level of confidence.

3. *What Procedures Are Used to Determine Whether the Trigger Has Occurred?*

Some agreements specified a method to determine whether the Tax MAC Out trigger had occurred, but others did not. Among the agreements that specified a method, the receipt (or absence) of an opinion or advice from counsel was the most common method of determining whether the Tax MAC Out triggering event had occurred.[86] There were some variations on this method, with some agreements providing additional specificity about which advisors' opinions count (*e.g.*, only specified counsel, particular additional counsel sought pursuant to specific procedures,[87] only "nationally recognized counsel,"[88] or "accounting firm[s] that [are] nationally recognized"[89] or, more specifically, "Big 4 accounting firms"[90] or a combination of such advisors). Interestingly, the Tax MAC Out in one agreement was triggered not by a tax opinion about the impact of a change per se, but rather, the determination of whether the trigger had occurred made "in the reasonable

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[85] *See, e.g.*, NJR Agreement, § 1.1, at 3 (defining "Change in Tax Law" as a change that "materially adversely affects" the specified tax treatment).

[86] *See, e.g.*, Clariant/Huntsman Agreement, § 9.5, at 78 (stating that an "Adverse 7874 Tax Law Change" occurs if, in the opinion of nationally recognized U.S. tax counsel, a change in law causes the undesirable result).

[87] *See, e.g.*, Amcor/Bemis Agreement, Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (providing that, if one party's advisor could not opine/advise, the *other party* was entitled to seek certain alternate counsel to opine instead).

[88] *See, e.g.*, Pfizer/Allergan Agreement, § 9.5, at 100–01 (defining "Adverse Tax Law Change" and referring to an opinion by "nationally recognized U.S. Tax counsel").

[89] *See, e.g.*, McKesson/Change Healthcare Agreement, § 1.01, at 2. This agreement defined "Alternative Tax Opinion Advisor" who could render the opinions required in Sections 9.01(iv)–(vi) to include a "law or accounting firm that is nationally recognized as an expert in federal income Tax matters and reasonably acceptable [to the relevant party]."

[90] Amcor/Bemis Agreement, Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (referring to a "'Big 4' accounting firm or nationally recognized tax counsel").

and good faith judgment of the Company, based on the written opinion of outside counsel."[91]

Several agreements did not include specific procedures for determining whether the Tax MAC Out trigger had occurred.[92] In these cases, other provisions of the agreement may nevertheless have provided guidance. For example, the general dispute resolution procedures (if any) in the agreement may have governed the resolution of a dispute whether the triggering event had occurred.[93] In addition, the procedure to determine whether a Tax MAC Out triggering event occurred may have followed the procedure (and the same difficult-to-meet standard[94]) used for determining if a regular MAC Out had occurred.[95] Such provisions may, however, leave substantial uncertainty when determining if the triggering event has occurred and whose judgment is determinative. Thus, efforts to exercise a Tax MAC Out could devolve into expensive litigation like many disputes over the application of regular MAC clauses.[96]

Detailed procedures for determining whether the triggering event has occurred may not be necessary if the parties expect that any change in law would lead to a relatively clear cut tax result or if the parties expect that the decision by any party to exercise the Tax MAC Out would not be particularly contentious. Otherwise, parties employing Tax MAC provisions should consider including clear procedures that explain how the triggering event of a Tax MAC

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[91] PharmAthene/Altimmune Agreement, § 6.3(g), at 75.

[92] *See, e.g.*, INC Research/inVentiv Agreement, § 6.1(g), at 80.

[93] For example, one agreement had a tax-specific dispute resolution procedure that applied to the determination whether a Tax MAC Out triggering event had occurred, but the procedure was contained in a document that did not appear to have been publicly filed. Linde/Praxair Agreement, Annex I, at A-1, A-1-10 (defining an "Adverse Tax Event" and providing that the determination of the trigger is "subject to the Tax Resolution Procedure," the definition of which referred to another document).

[94] *See, e.g.*, Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008) (explaining that a party "faces a heavy burden when it attempts to invoke a material adverse effect clause in order to avoid its obligation to close"); *see also* Nixon Peabody LLP, *Delaware Chancery Court issues rare decision finding Material Adverse Effect justifying termination of merger* (Oct. 9, 2018), https://www.nixonpeabody.com/-/media/Files/Alerts/2018-October/Material-Adverse-Effect-ruling-Oct18.ashx [https://perma.cc/CD8S-ENEX] (discussing a "rare" case "where a court has concluded that a Material Adverse Effect (MAE) existed that justified termination of a merger agreement" and noting that this case "may be the first time that a court in Delaware has reached such a conclusion").

[95] This is clearly the case when the Tax MAC is integrated into the regular MAC. *See, e.g.*, Harman/Symphony Agreement, § 12.01, at 91–92 (definition of "Material Adverse Effect").

[96] *See* Miller, *supra* note 9, at 2007, 2012 (explaining that "MAC clauses have . . . given rise to more litigation than any other provision of merger agreements" and that "[p]arties to merger agreements have often disagreed about whether one of them has suffered a MAC, and so MAC clauses have resulted in litigation in which tremendous sums of money, sometimes tens of billions of dollars, are at stake.").

provision is determined and that identify the party whose judgment is determinative.

D. *What Consequences Arise If a Change in Tax Law Triggers a Tax MAC?*

Tax MAC Outs, by definition, provide a termination right if triggered, but the agreements reviewed varied with respect to exactly how this right was incorporated into the agreement. Some agreements simply included the Tax MAC Out trigger as an explicit reason for termination.[97] A more common approach was to include, as a condition to the obligation of one or more of the parties to close, a requirement that the tax law had not changed in a way that triggered the Tax MAC provision.[98] Then, if the transaction did not close by a particular date (*e.g.*, because the "no Tax MAC" closing condition was neither satisfied nor waived), the agreements generally provided for a termination right.[99] One agreement did both—including the Tax MAC Out trigger both as a condition to close (which could lead to a termination right if the transaction did not close by a particular date) and as an explicit termination right.[100]

One possible advantage of including the Tax MAC Out trigger as an explicit termination right rather than including the trigger as a condition to closing that ultimately trickles through and leads to an eventual termination right relates to the timing of the termination. The former generally allows termination as soon as the Tax MAC Out trigger has occurred, while the latter only allows termination once the set end date has occurred without closing, even if that set date is months after the tax law change with the adverse effect. Of course, the parties could agree to terminate earlier pursuant to other termination provisions (*e.g.*, mutual consent), but including the Tax MAC Out trigger as an explicit reason to terminate may accelerate the exit from a transaction doomed by an adverse tax change.

A couple of the agreements interposed one or more additional steps between the adverse tax change and termination. For example, the Tax MAC Out trigger in one agreement allowed each party to terminate "specified covenants," but did not explicitly provide for termination of the entire agreement.[101] Nevertheless, the termination of the specified covenants generally

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[97] *See, e.g.*, Ashford 2015 Agreement, § 10.01(b)(vii), (c)(vi), at 86, 87.

[98] *See, e.g.*, Ensco/Atwood Agreement, § 6.1(g), at 68. The exact phrasing of the closing condition varied, as did the method for determining whether the closing condition was satisfied or not. *See supra* Part IV.C.

[99] *See, e.g.*, Ensco/Atwood Agreement, § 7.1(b), at 69–70.

[100] Clariant/Huntsman Agreement, §§ 7.1(f), at 70 (closing condition), 8.1(k), at 72 (termination provision).

[101] Linde/Praxair Agreement, § 8.3(b)(iii), at 52 (allowing termination of the "Specified Covenants" if an "Adverse Tax Event" occurs).

relieved the parties from their obligations to take certain steps (*e.g.*, obtain regulatory approvals for the transaction) that, if not taken, would likely cause closing conditions not to be satisfied, thereby leading to termination rights.[102] Another agreement included an obligation to work in good faith to restructure the transaction to avoid the adverse tax consequence resulting from the tax law change.[103] This agreement provided that a closing condition was not satisfied and a termination right was triggered only if the adverse tax consequences still existed after such restructuring efforts.[104]

Several other agreements included covenants obligating the parties to exert some level of effort to restructure or otherwise alter the transaction to avoid adverse tax consequences that arose because of a tax law change.[105] The provisions in those agreements differed from the Tax MAC Out provisions discussed in the prior paragraph because, under these other agreements, the failure to avoid the adverse tax consequence (after appropriate efforts) *did not* lead to a termination right.[106] Some agreements were quite explicit about this.[107] Thus, as explained in Part III, although these agreements could technically lead to a termination right if the parties failed to comply with the

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[102] *Id.* (for example, cancellation of specified covenants relieved the parties of the obligation (in § 6.4(c)(i)) to provide information to governmental authorities needed to obtain antitrust approvals, and if antitrust approvals were denied, the agreement could be terminated (§ 8.3(a)(v)). *See also* Praxair, Inc., Proxy Statement (Schedule 14A) 203–05 (Aug. 16, 2017), https://www.sec.gov/Archives/edgar/data/884905/000119312517259883/d405553ddefm14a.htm [https://perma.cc/CJ9F-J9TN] [hereinafter Praxair Proxy Statement] (explaining how an adverse tax change could ultimately lead to closing conditions not being satisfied, thereby leading to possible termination).

[103] Amcor/Bemis Agreement, § 6.14, at 70–71.

[104] *Id.* §§ 7.1, 8.1(d), at 71, 73, Exhibit A, conditions 3(d) & 4(d), at A-3 to A-4 (conditions to closing are not satisfied and either party has a termination right if, after good faith discussions about restructuring, tax advisors cannot opine that no tax law change causes the transaction to fail to qualify for specific favorable treatment under sections 368, 351, and 367(a)). This agreement also contained a termination right, "by mutual consent," if a tax law change prevented, after good faith discussion about restructuring, either party from obtaining an opinion/written advice sought by that party concerning section 7874. *Id.* §§ 6.14, 8.1(j), at 70–71, 74. With respect to section 7874, a tax law change that adversely affected the foreign/domestic status of the post-transaction parent corporation did *not* provide either party with a unilateral termination right. The tax change provision related to section 7874 was thus more similar to the Tax MAC restructuring provisions discussed in the next paragraph of the text. *See supra* note 20 (explaining that the Amcor/Bemis Agreement had both a Tax MAC Out and a Tax MAC restructuring provision).

[105] *See, e.g.*, Wright Medical/Tornier Agreement, § 2.14, at 22 (upon a "change in Tax Law, the parties agree to reasonably cooperate" to restructure); *see also* Appendix B (listing agreements with similar provisions).

[106] *See, e.g.*, Strongbridge/Novo Nordisk Agreement, § 7.06, at 39–40 (upon the specified adverse tax law change, parties "shall make commercially reasonable efforts to restructure," but the change did not trigger a termination right).

[107] *See, e.g.*, Polycom/Mitel Agreement, § 7.13, at 109–10 (obligating a party to "consider in good faith" a proposed restructuring to mitigate the consequences of a "Section 7874 Event," which included tax law changes that resulted in the parent corporation being treated as a domestic

covenant to exert the specified efforts to avoid the adverse tax consequences of a tax law change (*e.g.*, failing to negotiate in good faith about restructuring), that termination right was rather attenuated and quite unlikely to be triggered. As a result, this Article does not treat these agreements as including a Tax MAC Out.

Nevertheless, it is useful to note that Tax MAC provisions need not trigger exit rights. Adverse tax law changes can also trigger obligations to exert efforts to restructure the transaction, obligations to increase the amount of consideration, or obligations to make gross-up/indemnification payments,[108] or a wide variety of other rights or obligations. The variety of possible consequences that could be triggered by the occurrence of an adverse tax law change allows for extrapolation from this Article's discussion of Tax MAC Outs to any additional provision that is intended to alter the terms of a contract if tax laws change.[109]

E. *How (If at All) Does the Tax MAC Out Overlap with a General Tax Opinion Requirement?*

Many deals require a tax opinion that the transaction qualifies for the intended tax treatment. Often, this type of "general" tax opinion provision (*i.e.*, requiring an opinion that addresses the tax consequences in general, and not solely as a result of *changes* in tax law) is a condition to closing the transaction.[110] In those cases, a party's inability to obtain a general opinion about the desired tax treatment can prevent closing and lead to termination, regardless of whether that inability arises from the laws or facts as they existed prior to signing or from a change in law or a change in facts that arises between the time of signing and closing. As a result, a general tax opinion that is required as a condition to closing generally allows for termination if there is a material adverse change in tax law relating to the topic of the opinion (*i.e.*, a Tax MAC Out trigger) *or* if there are any other problems whatsoever that prevent the tax opinion from being rendered.

Thus, a general tax opinion required as a condition to closing implicitly provides a Tax MAC Out on the topic of the opinion. Accordingly, it is useful to understand the following: (1) whether deals with explicit Tax MAC Out provisions also included general tax opinions as a condition to closing (or

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corporation, but explicitly stating that neither party had "any right to avoid or delay Closing or terminate this agreement as a result of such Section 7874 Event").

[108] *See, e.g.*, Strongbridge/Novo Nordisk Agreement, §§ 1.01, 9.02(iv), at 4, 42 (providing that, in addition to triggering an obligation to exert a certain level of effort to restructure, an adverse tax law change triggered a gross-up/indemnification obligation).

[109] Most of the considerations discussed herein (particularly in Parts IV.A through IV.C and IV.F) are relevant to the design of such additional provisions.

[110] I refer to a "general" tax opinion to distinguish it from an opinion that relates only to the impact of a change in law between the time of signing and closing. *See supra* Part IV.C.3 (discussing opinions about tax law *changes*).

otherwise); (2) if so, the extent to which the Tax MAC Out provision and the general tax opinion provision overlapped; and (3) when (and why) a party might opt for one, the other, or both. The short answers are that (1) some, but far from all, deals with Tax MAC Out provisions also included general tax opinion provisions; (2) when a deal involved both types of provisions, there was usually a difference regarding the functions of the two provisions (*e.g.*, they addressed different issues, conferred rights on different parties, or spoke as of different points in time); and (3) the choice about whether to opt for one, the other, or both likely depended on the risk allocation decisions made by the parties and on counsel's willingness to render opinions. Examining the agreements provides greater insight.

1. *General Tax Opinion as a Condition to Close, but No Explicit Tax MAC Out*

Many agreements include a general tax opinion as a condition to closing and do not include an explicit Tax MAC Out.[111] This is not surprising because, as explained above, a general tax opinion closing condition provides all of the risk protection provided by an explicit Tax MAC Out covering the same topic and parties (*i.e.*, the ability to exit the transaction if the law changes in a way that adversely affects the particularly tax analysis), and more (*i.e.*, the ability to exit the transaction if any problems with the tax analysis arise for reasons other than a change in tax law). This may be one reason why the search for explicit Tax MAC Out provisions yielded so few results—an explicit Tax MAC Out provision is not needed in many cases because many deals already include a general tax opinion (on the same tax issue, for the same parties, etc.) as a condition to closing.

2. *Both a General Tax Opinion as a Condition to Close and an Explicit Tax MAC Out*

Some agreements included both a general tax opinion as a condition to closing and an explicit Tax MAC Out, but the general tax opinion provision and the explicit Tax MAC Out typically differed in an important way. In a few of these agreements, the tax opinion closing condition and the Tax MAC

[111] *See, e.g.*, Agreement and Plan of Merger and Reorganization Among SendGrid, Inc., Twilio Inc. and Topaz Merger Subsidiary, Inc. §§ 6.2(d), 6.3(d), at 66, 67 (Oct. 15, 2018), https://www.sec.gov/Archives/edgar/data/1477425/000110465918062234/a18-36735_1ex2d1.htm#Exhibit2_1_015801 [https://perma.cc/73VS-URBZ] (requiring, as conditions to SendGrid's and Twilio's obligations to close, their receipt of tax opinions from their respective counsel, to the effect that the merger "will qualify as a 'reorganization' within the meaning of Section 368(a) of the Code" but not including an explicit Tax MAC Out provision).

Out provision addressed different tax issues.[112] In such cases, a party presumably made a decision that, for one tax issue (*e.g.*, section 368 reorganization qualification), it wanted the extra risk protection offered by the general tax opinion condition to closing, but for another issue (*e.g.*, domestic/foreign classification of a corporation after an intended inversion), it was comfortable with the additional risk of the Tax MAC Out-only strategy.[113]

In some deals with both a general tax opinion closing condition and an explicit Tax MAC Out, the tax issue addressed by both provisions was the same, but the provisions differed in other, often subtle, ways. For example, the provisions conferred termination rights on different parties[114] or addressed the tax consequences of different parties.[115] In other agreements, the provisions covered slightly different steps in a multi-step transaction[116] or required different levels of confidence for the relevant determinations.[117] Further, the timing of the termination rights conferred by the provisions in some agreements was different (*e.g.*, a Tax MAC Out could allow termination immediately after any tax change, whereas a general tax opinion closing condition might only allow termination once a set date had passed without closing).[118] There could also be other similarly subtle differences that lead parties to include both an explicit Tax MAC Out and a general tax opinion closing

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[112] *See, e.g.*, Clariant/Huntsman Agreement, §§ 7.1(f), 7.3(c), 8.1(k), at 70, 71, 72 (Tax MAC Out on foreign/domestic treatment of post-transaction corporation and general tax opinion closing condition on qualification of the transaction under section 368 and gain recognition under section 367(a)).

[113] *See infra* notes 121–122 and accompanying text.

[114] *See, e.g.*, McKesson/Change Healthcare Agreement, §§ 7.03(g), 9.01(a)(v), at 90, 98 (general tax opinion closing condition allowed termination by only one party, but Tax MAC Out (relating to the same issue/analysis) allowed termination by that party and another).

[115] *See, e.g.*, Ashford 2018 Agreement, Article I, at 14–15, and § 8.03(j)(iii), at 78–79 (general tax opinion closing condition was only concerned with the tax consequences to two individuals, but the Tax MAC Out on the same basic tax issue was also concerned with the tax consequences to several additional parties).

[116] *See, e.g.*, *id.* (Tax MAC Out included income/gain recognition consequences of the "PM Formation Agreement" in addition to the consequences of certain other transactions, but general tax opinion condition to closing did not).

[117] *See, e.g.*, Ashford 2015 Agreement, Article I, at 2, § 8.03(j), at 83 (providing that the general tax opinion closing condition required a conclusion at the "more likely than not" level, but the Tax MAC Out used "would" language).

[118] *See, e.g.*, McKesson/Change Healthcare Agreement, §§ 7.03(g), 9.01(a)(ii), 9.01(a)(v), at 90, 97, 98 (failure to satisfy the general tax opinion closing condition triggered a unilateral termination right by either party only after a specified date had occurred without closing, whereas the Tax MAC Out provisions triggered unilateral termination rights as soon as the law change occurred (and specified additional steps were taken)); *see also supra* Part IV.D (discussing the difference between use of closing conditions and explicit termination provisions).

condition on the same tax issue. All of these situations typically involve nuanced choices about exactly which tax-related deal risks each party is willing to bear.

It is also possible that parties might want to include both types of provisions, even if the explicit Tax MAC Out provision does not cover any situation that is not already covered by the general closing condition tax opinion, a so-called "belt and suspenders" approach.

3. *Explicit Tax MAC Out, but No General Tax Opinion as a Condition to Close*

a. *In General.* Some agreements included an explicit Tax MAC Out but did not include a general tax opinion as a closing condition.[119] The use of this approach was likely driven by at least two factors: counsel's willingness to opine and the parties' risk allocation decisions.

There may be issues on which counsel does not feel comfortable giving a general tax opinion, in which case having such an opinion would not be an option. This could be because the tax issue of concern is the ongoing tax treatment for the parties after the closing (*e.g.*, foreign or domestic treatment of a corporation, availability of post-transaction credits) rather than the tax treatment of closing of the deal itself (which is a more common subject of opinions) or because the analysis depends on material facts that are only known after (not at) closing (and with respect to which counsel cannot obtain sufficient assurance in advance of closing), among other reasons. Even in these situations, however, counsel might be more willing to opine about whether the law *changed* after signing in a way that is likely to affect the tax analysis; such an opinion is much more discrete. These concerns may help explain why, for example, none of the reviewed deals included a general tax opinion closing condition on the post-transaction domestic/foreign status of a corporation or on the post-transaction availability of certain credits, despite including Tax MAC Outs on these topics.[120]

A party may also opt to proceed with only a Tax MAC Out and no general tax opinion closing condition if, taking into account all of the other deal

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[119] *See, e.g.*, INC Research/inVentiv Agreement, § 6.1(g), at 80 (Tax MAC Out relating to the transaction's qualification as a reorganization under section 368); INC Research Holdings, Inc., Proxy Statement (Schedule 14A) 30 (June 30, 2017), https://www.sec.gov/Archives/edgar/data/1610950/000119312517220226/d402308ddefm14a.htm [https://perma.cc/8KN7-XFXT] (stating that no opinion or private letter ruling on the transaction's qualification as a reorganization under section 368 was required as a condition to closing, but disclosing the Tax MAC Out on the same issue).

[120] *See, e.g.*, Ensco/Atwood Agreement, §§ 6.1(g), 8.15, at 68, 79 (Tax MAC Out but no general tax opinion closing condition relating to the foreign/domestic status of the post-transaction corporation); NJR Agreement, § 6.1(h), at 44 (Tax MAC Out but no general tax opinion closing condition relating to the availability of energy production tax credits post-transaction).

terms (including price), the party is willing to bear the additional risk that accompanies a narrower termination right (*i.e.*, being able to terminate only if the desired tax treatment fails due to a change in law but not due to any other reason).[121] The party may conclude that this additional risk (*i.e.*, that the desired tax treatment fails for a reason other than a change in law) is minimal, such that the party is willing to bear it. This decision would likely be informed by tax analysis performed by that party's counsel prior to signing. Presumably, the party's counsel analyzed the tax treatment of the transaction under the laws and facts that existed through the time of signing the agreement, doing whatever diligence and securing whatever representations, warranties, and covenants were needed to give the party sufficient confidence in the tax treatment to proceed.[122]

b. *General Tax Opinion Included, But Not as a Condition to Close.* Some deals that included an explicit Tax MAC Out and lacked a general tax opinion closing condition, still involved a general tax opinion—just not as a condition to close.[123] The reason for adopting such an approach may relate to when the relevant determinations are made. For example, in some transactions, a general tax opinion was rendered at a time *prior* to the closing *(e.g.*, no later than the date of the proxy/prospectus), but the Tax MAC Out (on the same issue as the general tax opinion) continued to apply and could have triggered a termination right for the full period until closing.[124] In these situations, the general tax opinion presumably provided the relevant party (and

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[121] The other party may be willing to pay more (or accept less) in the deal because there is a lower risk that the deal will be terminated given the first party's more limited exit rights.

[122] These deals often included representations from the parties relevant to the tax analysis on the issue subject to the Tax MAC Out, covenants that the parties would not take actions that would cause the transactions not to qualify for the favorable tax treatment that was the subject of the Tax MAC Out, or language in the agreement or in the relevant publicly filed disclosure document to the effect that the parties intended or expected the transaction to qualify for the favorable tax treatment that was the subject of the Tax MAC Out. *See, e.g.*, Ensco/Atwood Agreement, § 5.15, at 64 (covenant requiring parties to provide certificates with representations establishing that the inversion rules did not cause the parent corporation to be treated as a domestic corporation); Pfizer/Allergan Agreement, § 6.14, at 87–88 (covenant not to take action that would cause section 7874 ownership threshold not to be met); Praxair Proxy Statement, *supra* note 102, at 496 (relevant post-transaction corporation "is expected to be treated as a foreign corporation for U.S. federal income tax purposes").

[123] *See supra* Part IV.E.2 (discussing coverage differences that could lead a party to want both an explicit Tax MAC Out and a general tax opinion condition).

[124] *See, e.g.*, Bemis Company, Inc., Proxy Statement/Prospectus (Schedule 14A) 5–6 (March 27, 2019), https://www.sec.gov/Archives/edgar/data/11199/000104746919001684/a2238139zdefm14a.htm [https://perma.cc/28DY-Z8NW] [hereinafter Bemis Company Proxy Statement] (explaining that, on March 25, 2019, Kirkland & Ellis rendered a will-level opinion that the transaction qualified for the intended tax treatment, and noting that, as a condition to closing, certain tax advisors must render an opinion at a should-level or higher that there had not been a tax law change that would cause the transaction not to qualify for the intended tax treatment);

any shareholders who must vote on the deal) confidence concerning the tax treatment as of the date of the issuance of the opinion. The tax analysis could, however, change between the issuance of the opinion and the closing. Thus, the addition of the Tax MAC Out protected the party from adverse consequences arising from changes in tax law that could occur in the remaining period prior to closing.

Of course, this approach (with a general tax opinion issued prior to closing and a Tax MAC Out covering the remaining time until closing) does not provide as much protection for the party as would the inclusion of a general tax opinion closing condition. Under the approach described in this Part, if a problem with the tax analysis is discovered after the opinion is rendered but before the closing, no termination right arises unless the problem is due to a change in tax law. Nevertheless, the issuance of the general tax opinion prior to the closing date may provide sufficient confidence for the party to proceed despite having a more limited termination right for the period remaining between the issuance of the opinion and the closing.

4. *Conclusion About Whether to Include a General Tax Opinion Provision or an Explicit Tax MAC Out*

Ultimately, if counsel is willing to render a general tax opinion on the relevant tax issue, a party considering whether to request a general tax opinion (perhaps as a condition to closing) or a Tax MAC Out should identify which tax situations would warrant exiting the transaction and when they would be willing to accept the risk of being obligated to continue the transaction despite unfavorable tax results. If the key concern is that the law might change between signing and closing, a Tax MAC Out might provide sufficient protection. If, however, a party is concerned about the impact of existing law, existing (or unknown) facts, changes in facts between the time of signing and closing, or counsel's analysis of any of these factors, the party might prefer a general tax opinion as a condition to close if the party wants to retain the ability to exit the transaction if any of these factors produces an undesirable tax result.

Of course, there are many possible approaches to address these concerns. One approach that provides broader exit rights (and less risk to a party that might want to terminate) than a Tax MAC Out but narrower exit rights (and more risk) than a general tax opinion closing condition involves a termination right that arises upon a change, between signing and closing, in either the tax

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Amcor/Bemis Agreement, § 7.1, at 71, Exhibit A, conditions 3(d) and 4(d), at A-3 to A-4 (requiring, as a condition to closing, opinions that there had been no tax law change, the effect of which would be to make the transaction not to qualify for the intended tax treatment).

law *or in the facts* that results in the specified adverse impact on the tax analysis of the transaction.[125] Alternatively (or in addition), the parties could provide that different termination triggers yield different termination payouts. For example, the termination fee could be higher if the party terminates because of counsel's inability to render a general tax opinion that is a condition to closing and lower if the party terminates pursuant to a Tax MAC Out. In this situation, the party that might want to exit bears more deal risk than it would have had the former termination fee been as low as the latter, but less deal risk than it would have had there been no general tax opinion closing condition at all. Ultimately, there are many permutations, and the right one for a given deal depends on the tax issues, uncertainty of the tax analysis, sources of that uncertainty, likelihood of changes in law or facts, the risk appetites of the parties, and more.

F. *How (If at All) Is the Tax MAC Out Discussed in the Publicly Filed Disclosure Documents?*

The deals' publicly filed disclosure documents (whether just 8-Ks or also proxy statements[126]) varied considerably as to whether and how they discussed the Tax MAC Out and the related tax issues. The documents range from some proxy statements that discussed the Tax MAC Out extensively and repeatedly[127] to some 8-Ks that did not mention the Tax MAC Out at all.[128]

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[125] *See, e.g.*, McKesson/Change Healthcare Agreement, §§ 9.01(a)(v), 9.01(a)(vi), at 98, 99 (providing a termination right because of a change in law or a change in facts outside the control of the relevant parties, which resulted in the specified adverse tax consequence); *see also id.* § 9.01(a)(iv), at 98 (providing a termination right because of a change in law or the occurrence of a "Tainting Acquisition" outside the control of the relevant party, which resulted in the specified adverse tax consequence).

[126] For purposes of this discussion, the reference to proxy statements includes any proxy statement, proxy statement/prospectus, joint proxy statement/prospectus, or proxy statement/prospectus/consent solicitation. This discussion of proxy statements also includes the preliminary joint proxy statement/prospectus for the Pfizer/Allergan transaction, although no final document was filed because the transaction was terminated.

[127] *See, e.g.*, Pfizer Inc. and Allergan plc, Preliminary Joint Proxy Statement/Prospectus, 16, 24–25, 78, 158–59, 168 (Mar. 4, 2016), https://www.sec.gov/Archives/edgar/data/1578845/000119312516493703/d22420ds4.htm [https://perma.cc/T8S9-9CX8].

[128] *See, e.g.*, New Jersey Resources Corporation, Current Report (Form 8-K) (Nov. 21, 2018), https://www.sec.gov/Archives/edgar/data/356309/000120677418003240/njr3503991-8k.htm [https://perma.cc/25XK-RCZW] [hereinafter NJRC Current Report].

For every deal in which a proxy statement was filed, the Tax MAC Out was discussed in the section of the proxy that explained the transaction agreement's closing conditions or possible termination events.[129] The proxy statements varied, however, as to whether the Tax MAC Out was discussed elsewhere in the document. Some proxy statements also discussed the Tax MAC Out in the risk factor section, the tax disclosure, or the section discussing the factors relevant to the parties' decision to undertake the transaction.[130] In other proxies, these additional sections often raised the tax *issue* of concern (*e.g.*, flagging the possibility that the post-transaction parent corporation might be treated as a domestic corporation for federal income tax purposes), but these sections did not specifically mention the Tax MAC Out (*i.e.*, the possibility that the deal might be terminated if the law changed in a way that caused specified adverse tax consequences).[131]

For some of the transactions with Tax MAC Outs, no proxy statement was filed, and only an 8-K was available. This was likely because no vote of public shareholders was required or because the deal terminated before the proxy

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[129] *See, e.g.*, Ensco plc & Atwood Oceanics Inc., Joint Proxy Statement/Prospectus (Schedule 14A), 113 (Aug. 18, 2017), https://www.sec.gov/Archives/edgar/data/8411/000104746917005317/a2233066zdefm14a.htm [https://perma.cc/HU85-3J8U] [hereinafter Ensco/Atwood Joint Proxy Statement] (flagging, as a condition to closing the transaction, the absence of a change in law that would cause Ensco to be treated as a domestic corporation for U.S. tax purpose); PharmAthene, Inc. & Altimmune Inc., Proxy Statement/Prospectus/Consent Solicitation, 151 (Mar. 31, 2017), https://www.sec.gov/Archives/edgar/data/1326190/000114420417018516/v463109_424b3.htm [https://perma.cc/S8ZK-YCJR] (mentioning the Tax MAC Out in the section about conditions to closing).

[130] *See, e.g.*, Bemis Company Proxy Statement, *supra* note 124, at 5–6, 26–27, 62, 117, 126, 157–58 (mentioning in the risk factors section, the tax disclosure section, and the section discussing factors relevant to Amcor's decision to enter into the transaction, in addition to the section discussing closing conditions, that a condition to closing the transaction was the absence of a tax law change that would cause the transaction to fail to qualify for the intended tax treatment); Praxair Proxy Statement, *supra* note 102, at 65, 204–05 (mentioning the Tax MAC Out in the risk factors section and the section describing termination rights); *id.* at 102–08 (mentioning tax in the section discussing factors relevant to entering into the deal, but not raising the specific inversion-related tax concerns or the Tax MAC Out); *id.* at 494–501 (discussing, in the tax disclosure, the tax issue of concern and noting, in bold caps, possible change in relevant tax law, but not mentioning the possible termination right that could arise as a result of such a change).

[131] *See, e.g.*, Ensco/Atwood Joint Proxy Statement, *supra* note 129, at 25–26 (discussing the section 7874 concern in the risk factors and even noting that the relevant tax laws could change with adverse effect, but not mentioning the termination right that could arise if the tax law did so change); *id.* at 131–32 (tax disclosure taking the same approach).

statement was filed. The 8-Ks announcing two of these deals mentioned the Tax MAC Out,[132] and the 8-K announcing two other deals did not.[133]

The different approaches to discussing the Tax MAC Outs in the public filings likely reflected the parties' differing assessments about the likelihood of the possible tax changes and how material the possible tax *changes* might have been to an investor's decision whether to vote for the transaction (where votes were solicited) or whether to buy, sell, or hold the stock of the disclosing corporation.

V. Conclusion

Uncertainty about future tax law changes can stymie desirable business transactions. One way to manage that uncertainty is for the parties to a deal to contract explicitly with respect to their rights and obligations if tax law changes ultimately occur. Tax MAC Out provisions in M&A agreements provide examples of this type of contracting, and because these provisions are carefully tailored to the specific circumstances in which they are used, they illustrate a wide range of possible approaches on key deal points. Thus, this Article's study of the details of Tax MAC Out provisions offers guidance about the design, drafting, and deployment of tax-transition, risk-shifting provisions both in M&A agreements and elsewhere. More generally, this study provides insights into strategies for managing deal risk posed by the possibility of future tax law changes and into deal-making practices when tax laws may change.

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[132] Change Healthcare Holdings, Inc., Current Report (Form 8-K), Item 1.01 (July 5, 2016), https://www.sec.gov/Archives/edgar/data/1444598/000119312516641593/d220020d8k.htm [https://perma.cc/P5B6-DTBX]; Huntsman Corporation, Current Report (Form 8-K), Item 1.01 at 2 (May 23, 2017), https://www.sec.gov/Archives/edgar/data/1089748/000104746917003559/a2232239z8-k.htm [https://perma.cc/D3KB-ST63].

[133] *See* NJRC Current Report, *supra* note 128; Harman International Industries, Incorporated, Current Report (Form 8-K) (Jan. 26, 2015), https://www.sec.gov/Archives/edgar/data/800459/000119312515020336/ d857058d8k.htm [https://perma.cc/FPM9-YR75] (mentioning the general MAC provision, but not the tax-specific portion).

Appendix A—Agreements with Tax MAC Outs

Amcor/Bemis Agreement—Transaction Agreement by and among Amcor Limited, Arctic Jersey Limited, Arctic Corp., and Bemis Company, Inc. (dated as of Aug. 6, 2018), https://www.sec.gov/Archives/edgar/data/11199/000110465918049859/a18-18341_1ex2d1.htm [https://perma.cc/RDZ7-ZKCE].

Ashford 2015 Agreement—Acquisition Agreement between Archie Bennett, Jr., Monty J. Bennett, Remington Holdings GP, LLC, Mark A. Sharkey, Remington Holdings, LP, Ashford, Inc., Ashford Advisors, Inc., Remington Hospitality Management, Inc., Ashford GP Holdings I, LLC, and Remington GP Holdings, LLC (dated as of Sept. 17, 2015), https://www.sec.gov/Archives/edgar/data/1604738/000110465915065950/a15-19726_1ex2d1.htm [https://perma.cc/VUJ3-YXF7].

Ashford 2018 Agreement—Combination Agreement among Archie Bennett, Jr., Monty J. Bennett, Remington Holdings, L.P., Remington Holdings GP, LLC, Project Management LLC, MJB Investments, LP, Mark A. Sharkey; Ashford, Inc., Ashford Holding Corp., and Ashford Merger Sub Inc. (dated as of Apr. 6, 2018), https://www.sec.gov/Archives/edgar/data/1604738/000110465918022977/a18-9722_1ex2d1.htm [https://perma.cc/4H9D-Z2JQ].

Clariant/Huntsman Agreement—Agreement and Plan of Merger by and among Clariant Ltd, HurricaneCyclone Corporation, and Huntsman Corporation (dated as of May 21, 2017), https://www.sec.gov/Archives/edgar/data/1089748/000104746917003559/a2232239zex-2_1.htm [https://perma.cc/N6LW-SFCZ].

Ensco/Atwood Agreement—Agreement and Plan of Merger by and among Ensco PLC, Echo Merger Sub LLC, and Atwood Oceanics, Inc. (dated as of May 29, 2017), https://www.sec.gov/Archives/edgar/data/314808/000110465917036192/a17-14344_2ex2d1.htm [https://perma.cc/SR9N-95FZ].

Harman/Symphony Agreement—Agreement and Plan of Merger by and among Symphony Teleca Corporation, Harman International Industries, Inc., Sabita Sub, Inc., and Symphony Technology Group, L.L.C., (dated as of Jan. 22, 2015), https://www.sec.gov/Archives/edgar/data/800459/000119312515020336/d857058dex21.htm [https://perma.cc/V6HD-TQ39].

Haymaker/One Spa World Agreement—Business Combination Agreement by and among Steiner U.S. Holdings, Inc., Nemo (UK) Holdco, Ltd, Steiner UK Limited, Steiner Management Services, LLC, Haymaker Acquisition Corp., OneSpaWorld Holdings Limited, Dory US Merger Sub, LLC, Dory Acquisition Sub, Limited, Dory Acquisition Sub, Inc., Dory Intermediate LLC, and, in its capacity as a Seller and as the Seller Representative, Steiner Leisure Limited (dated as of Nov. 1, 2018), https://www.sec.gov/Archives/edgar/data/1707306/000119312518315954/d598255dex21.htm [https://perma.cc/E3XW-AK22].

INC Research/inVentiv Agreement—Agreement and Plan of Merger by and between Double Eagle Parent, Inc. ("inVentiv") and INC Research Holdings, Inc. (dated as of May 10, 2017), https://www.sec.gov/Archives/edgar/data/1610950/000119312517166114/d384591dex21.htm [https://perma.cc/94KU-4W92].

Linde/Praxair Agreement—Business Combination Agreement by and among Linde Aktiengesellschaft, Praxair, Inc., Zamalight PLC, Zamalight Holdco LLC, and Zamalight Subco, Inc. (dated as of June 1, 2017), https://www.sec.gov/Archives/edgar/data/884905/000119312517191218/d506854dex21.htm [https://perma.cc/49DL-8N22].

McKesson/Change Healthcare Agreement—Agreement of Contribution and Sale by and among PF2 NewCo LLC, PF2 NewCo Intermediate Holdings, LLC, PF2 NewCo Holdings, LLC, McKesson Corporation, HCIT Holdings, Inc., Change Healthcare, Inc., Change Aggregator L.P., and H&F Echo Holdings, L.P. (dated as of June 28, 2016), https://www.sec.gov/Archives/edgar/data/927653/000119312516641582/d221363dex21.htm [https://perma.cc/U5F4-ATNQ].

NJR Agreement—Membership Interest Purchase Agreement between NJR Clean Energy Ventures II Corporation and SRIV Partnership, LLC (dated as of Nov. 21, 2018), https://www.sec.gov/Archives/edgar/data/356309/000120677418003240/njr3503991-ex21.htm [https://perma.cc/CG2Y-KXH6].

Pfizer/Allergan Agreement—Agreement and Plan of Merger by and among Pfizer, Inc., Allergan PLC and Watson Merger Sub Inc. (dated as of Nov. 22, 2015), https://www.sec.gov/Archives/edgar/data/78003/000119312515385453/d70588dex21.htm [https://perma.cc/JZ2T-5L8T].

PharmAthene/Altimmune Agreement—Agreement and Plan of Merger and Reorganization by and among PharmAthene, Inc., Mustang Merger Sub Corp I Inc., Mustang Merger Sub II LLC, Altimmune, Inc., and

Shareholder Representative Services LLC, as Securityholders' Representative (dated as of Jan 18, 2017), https://www.sec.gov/Archives/edgar/data/1326190/000114420417002826/v457081_ex2-1.htm [https://perma.cc/NEX4-L2R4].

Appendix B—Agreements with Tax MAC Provisions Triggering Efforts to Restructure

ACETO/Citron Agreement—Product Purchase Agreement by and among Citron Pharma LLC, Lucid Pharma LLC, the direct and indirect equity holders of sellers named herein, Romeo Charlie Acquisition I, LLC, Romeo Charlie Acquisition II, LLC, ACETO Corporation and Vimal Kavuru, as agent (dated as of Nov. 2, 2016), https://www.sec.gov/Archives/edgar/data/2034/000157104916019347/t1600678_ex2-1.htm [https://perma.cc/2PZC-ZKA4].

Lakes Entertainment/Golden Gaming—Agreement and Plan of Merger by and among Lakes Entertainment Inc., LG Acquisition Corporation, Sartini Gaming, Inc., ("Golden Gaming"), and The Blake L. Sartini and Delise F. Sartini Family Trust (dated as of Jan. 25, 2015), https://www.sec.gov/Archives/edgar/data/1071255/000143774915001219/ex2-1.htm [https://perma.cc/3D9X-BSKW].

NY REIT/JBG Debt Maintenance Agreement—Debt Maintenance Agreement in Exhibit H to Master Combination Agreement by and among New York REIT, Inc., New York Recovery Operating Partnership, L.P., JBG Properties Inc., JBG/Operating Partners, L.P., and the Jaguar Parties set forth on Schedule A (dated as of May 25, 2016), https://www.sec.gov/Archives/edgar/data/1474464/000110465916123734/a16-10302_4ex2d1.htm [https://perma.cc/8MS9-LRZV].

Polycom/Mitel Agreement—Agreement and Plan of Merger by and among Polycom, Inc., Mitel Networks Corporation, and Meteor Two, Inc. (dated as of April 15, 2016), https://www.sec.gov/Archives/edgar/data/1010552/000119312516544639/d183833dex21.htm [https:// perma.cc/P6T8-3PMJ].

Strongbridge/Novo Nordisk Agreement—Macrilen Acquisition Agreement between Novo Nordisk Healthcare AG and Strongbridge Biopharma Public Limited Company (dated as of Oct. 31, 2018), https://www.sec.gov/Archives/edgar/data/1634432/000110465918065143/a18-39298_1ex2d1.htm [https://perma.cc/4ECZ-7FRM].

Wright Medical/Tornier Agreement—Agreement and Plan of Merger by and among Tornier N.V., Trooper Holdings Inc., Trooper Merger Sub Inc., and Wright Medical Group, Inc. (dated as of Oct. 27, 2014), https://www.sec.gov/Archives/edgar/data/1492658/000119312514383336/d810468dex21.htm [https://perma.cc/RRQ8-LK6T].