Ivins Phillips Barker
CHARTERED

April 1, 2025

Via Electronic Submission
Andres Garcia
Internal Revenue Service, Room 6526
1111 Constitution Avenue,
Washington, D.C. 20044

Re: OMB Number 1545-1641: Mark-to-Market Election for Commodities Dealers and Securities and Commodities Traders

Dear Sir:

On January 17, 2025, in 90 Fed. Reg. 6,098, the Internal Revenue Service ("IRS") issued a Notice requesting comments regarding the operation of, and record keeping requirements under, Rev. Proc. 99-17, which deals with the election to use the mark-to-market ("MTM") method by commodities dealers and securities and commodities traders. This comment letter is being filed in response to that Notice.

BACKGROUND

A similar Notice was issued on September 16, 2021, requesting comments on the operation and record keeping requirements of Rev. Proc. 99-17. 86 Fed. Reg. 51,726 (Sept. 16, 2021). In response to that Notice, we filed comments on behalf of our clients. The central issue that we addressed in those comments was the failure of Rev. Proc. 99-17 to deal with the practical problems posed by the filing deadlines contained in Rev. Proc. 99-17 when an existing taxpayer first enters into transactions subject to the provisions in Rev. Proc. 99-17 during a particular taxable year but after the first 2½ months of that year.

In a situation where a taxpayer is eligible to make an MTM election for a particular taxable year, section 5.03(1) of Rev. Proc. 99-17 provides that the election to use the MTM method must be filed either with the federal income tax return for the taxable year immediately preceding the taxable year for which the election would be effective or with a request for extension of time to file the taxpayer's tax return for the immediately preceding taxable year. This deadline obviously contemplates a situation where a taxpayer is already engaged in transactions to which an MTM election could apply at the time it timely files the election.

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The Internal Revenue Service has informally indicated that a taxpayer may not file a protective MTM election before the taxpayer enters into any transactions to which an MTM election otherwise could apply. This means that a taxpayer that begins to enter into MTM transactions for the first time after the first 2½ months after the beginning of any taxable year must wait to make an MTM election until the following taxable year. Thus, a taxpayer in that position must file its tax return for the taxable year in which it initiates MTM-election-eligible activities by using the realization method. In the next taxable year, the taxpayer must file both an election to use the MTM method pursuant to Rev. Proc. 99-17 and a Form 3115 requesting permission to change to the MTM method. That change may be eligible for the automatic consent procedures in Rev. Proc. 2024-23. *See* Rev. Proc. 2024-23 § 24.01.

In our prior comment letter, we identified the practical problems that such requirements pose. Taxpayers cannot easily and cost-effectively establish recordkeeping systems to report transactions on a realization method and then immediately switch to an MTM method in the following taxable year. In response to those practical problems, the IRS informally suggested to us that a taxpayer in that situation would have the option of forming a new legal entity to enter into transactions for which an MTM election could be made. However, in many situations it is not practical to isolate transactions to which an MTM election could apply in a separate legal entity. For example, forming a new legal entity still does not solve the issue of maintaining recordkeeping systems on a realization method in one year only to switch in the following year to maintaining systems on a MTM method. In addition, it may require transferring individuals and their employment contracts from one entity to the new entity (which could cause unnecessary concerns among those employees) or entering into intercompany services agreements and possibly raising various other non-tax issues that seem unnecessary to have to address, especially given our proposed solution described below.

The problems we pointed out in our comment letter will be exacerbated by the recent proposed extension of the MTM election provisions to foreign currency ("FX") transactions subject to section 988. *See* 89 Fed. Reg. 67,336 (Aug. 20, 2024). The preamble to those proposed regulations provides:

> The Treasury Department and the IRS are of the view that aligning proposed §1.988-7 with the rules for making a section 475 election will deter selectively recognizing losses. The rules for making or revoking a section 475 election deter taxpayers from selectively recognizing losses by requiring that taxpayers generally make an election on the tax return for the year immediately preceding the year to which the election applies, *see* section 5.03 of Rev. Proc. 99-17, 1999-1 C.B. 503, 504-505, and then by requiring taxpayers to apply that election to all subsequent years unless the taxpayers obtain the consent of the Commissioner. *See* section 475(e)(3) and (f)(3). The Treasury Department and the IRS expect that implementing similar rules for making a proposed §1.988-7 election would also prevent selective recognition of losses. The Treasury Department and the IRS also expect that aligning the rules for making a proposed §1.988-7 election with the rules

> for making a section 475 election will foster compliance, especially for those taxpayers already making a section 475 election, by providing the same procedures for making or revoking these elections to adopt a mark-to-market method of accounting.

89 Fed. Reg. at 67,338.

Thus, the timing problem that exists for certain taxpayers under section 475 is going to be magnified by the extension of the provisions in Rev. Proc. 99-17 to an election to MTM FX transactions subject to section 988. Moreover, the use of a separate legal entity in that circumstance—to isolate FX transactions in a new legal entity for the purpose of making an MTM election for section 988 transactions—is even less feasible than in the case of securities and commodities transactions subject to section 475.

PROPOSED SOLUTION

We believe that a simple solution to these problems would be for the IRS to amend Rev. Proc. 99-17 to provide an additional 2½-month MTM election deadline for taxpayers that have not yet engaged in transactions to which the MTM election could apply. In that circumstance, the 2½-month window for making an MTM election during any taxable year would start on the first day of the month in which the taxpayer first enters into any type of transaction to which an MTM election could apply, rather than having the deadline start at the beginning of the taxable year.

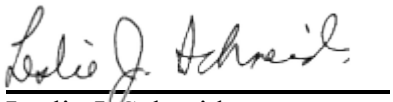
That solution would give taxpayers that are not currently entering into the types of transactions to which an MTM election could apply the same 75-day election deadline that a new taxpayer would have in deciding whether to make an MTM election. This new election deadline would give taxpayers no greater benefit of hindsight than a taxpayer routinely entering into transactions to which an MTM election could apply.

Moreover, in terms of precedents within the Internal Revenue Code, it is difficult to think of a situation where a taxpayer that first enters into a type of transaction requiring the adoption of a method of accounting is prevented from adopting the taxpayer's preferred method for that transaction until the following taxable year. It is simply unfair in such circumstances to compel a taxpayer to adopt one method of accounting and then subsequently undergo the process of filing a request to change to another method of accounting in the following year. In our view, the current procedures are nonsensical and impractical and serve no reasonable policy. Moreover, our proposed solution does not advantage a taxpayer first entering into transactions after the deadline in Rev. Proc. 99-17 over other taxpayers that are routinely entering into those transactions as, in either case, the taxpayer can apply hindsight by only up to 2½ months.

We would be pleased to discuss our suggested solution if someone at the IRS is so inclined. We can be reached at (301) 785-0294.

Respectfully submitted,

IVINS, PHILLIPS & BARKER, CHARTERED

By: 
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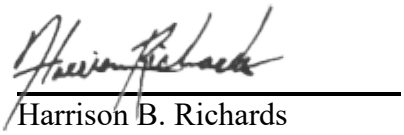
By: 
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