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subject: Retroactive Real Estate Investment Trust ("REIT") Election and Section 351 Control Requirement

This Chief Counsel Advice supplements the Chief Counsel Advice dated June 20, 2014 from Robert A. Martin, Senior Technician Reviewer, Branch 1 (Financial Institutions & Products) (the "June 20 CCA"). For definitions of capitalized terms not defined herein, and for a lengthier discussion of the pertinent facts, please refer to the June 20 CCA. This advice may not be used or cited as precedent.

The June 20 CCA concludes, in part, that if BankLLC's REIT election were effective as of the date of BankLLC's formation, then Failed Institution would be deemed to have contributed BankLLC's assets to BankLLC (the "Deemed Contribution") in a section 351 transaction immediately before the close of the preceding day, and BankLLC's basis in any built-in loss assets should have been reduced to such assets' fair market value under section 362(e)(2) immediately after the deemed contribution (unless Failed Holdco made a timely election under section 362(e)(2)(C)).

Section 362(e)(2) would apply to the Deemed Contribution if such contribution were treated as a section 351 transaction. However, after further consideration, we question whether Failed Institution was in "control" of BankLLC for purposes of section 351(a) immediately after the Deemed Contribution.

As described in the June 20 CCA, Failed Institution formed BankLLC (a single-member LLC that Failed Institution treated as a disregarded entity for Federal income tax

purposes) on Date 1, Year 1. That same day, Failed Institution transferred the REMIC Securities to BankLLC. On Date 2, Year 1, Bank acquired Failed Institution's deposit liabilities and assets (including the REMIC Securities, which were held by BankLLC) in the Acquisition. Subsequently, on Date 6, Year 2, BankLLC elected to be treated as a REIT for Federal income tax purposes effective as of Date 1, Year 1 (the "Retroactive REIT Election").

If the Retroactive REIT Election were respected as being effective as of Date 1, Year 1, then BankLLC would be deemed to have elected to be classified as an association for Federal income tax purposes effective at the start of that day (see Treas. Reg. § 301.7701-3(c)(1)(v)(B)). As a consequence, Failed Institution would be deemed to have contributed all of BankLLC's assets and liabilities to BankLLC in exchange for stock therein immediately before the close of the prior day (see Treas. Reg. § 301.7701-3(g)). The tax treatment of BankLLC's change in entity classification would be determined under all relevant provisions of the Internal Revenue Code and general principles of tax law (see id.).

Section 351(a) provides that no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and, immediately after the exchange, such person(s) are in "control" (as defined in section 368(c)) of the corporation. Section 368(c) defines the term "control" to mean the ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of all other classes of stock of the corporation.

The "control" requirement of section 351(a) is not satisfied, however, if the transferor is under a binding commitment at the time of the exchange to transfer the transferee corporation's stock to another person in a taxable disposition. See, e.g., Hazeltine Corp. v. Commissioner, 89 F.2d 513 (3d Cir. 1937); S. Klein on the Square, Inc. v. Commissioner, 188 F.2d 127 (2d Cir. 1951), cert. denied, 342 U.S. 824 (1951); Rev. Rul. 70-522, 1970-2 C.B. 81; Intermountain Lumber Co. v. Commissioner, 65 T.C. 1025 (1976); Rev. Rul. 79-70, 1979-1 C.B. 144; Rev. Rul. 79-194, 1979-1 C.B. 145; Rev. Rul. 83-23, 1983-1 C.B. 82; Rev. Rul. 2003-51, 2003-1 C.B. 938. As the Tax Court stated in Intermountain Lumber, 65 T.C. at 1031:

> A determination of 'ownership,' as that term is used in section 368(c) and for purposes of control under section 351, depends upon the obligations and freedom of action of the transferee with respect to the stock when he acquired it from the corporation….If the transferee, as part of the transaction by which the shares were acquired, has irrevocably foregone or relinquished at that time the legal right to determine whether to keep the shares, ownership in such shares is lacking for purposes of section 351.

When BankLLC made the Retroactive REIT Election that triggered the Deemed Contribution, Failed Institution (the transferor) no longer owned BankLLC (the transferee

corporation). Thus, as part of the Deemed Contribution, Failed Institution should be viewed as having irrevocably foregone or relinquished at the time of the Deemed Contribution the legal right to determine whether to keep the BankLLC shares. In other words, Bank's purchase of BankLLC (a disregarded entity) followed by BankLLC's Retroactive REIT Election (which triggered the Deemed Contribution) is analogous to a situation in which Failed Institution transferred the REMIC Securities to BankLLC in a purported section 351 transaction and sold BankLLC to Bank under a binding commitment.

In sum, if BankLLC's REIT election were effective as of the date of BankLLC's formation, we believe the Deemed Contribution would not satisfy the "control" requirement in section 351(a). Consequently, BankLLC's basis in the REMIC Securities immediately after the Deemed Contribution would be the fair market value thereof.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 317-5357 if you have any further questions.

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