GT GreenbergTraurig

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What Every Fund Manager Wants to Know about the ECI Rules (But is Afraid to Ask)

Short of a tornado or a cataclysmic earthquake obliterating midtown Manhattan or Greenwich, CT, there is little that offshore fund managers fear more than the specter of their funds' being treated as engaged in a United States trade or business. This fear is well-grounded; the incremental tax that results from this treatment may exceed 50 percent. This alert outlines how a fund can remain "in bounds," without running afoul of the rules that can cause this expense. It ends with certain suggestions for structuring and best practices.

1) The Securities and Commodities Safe Harbor

Funds which trade in the U.S. capital markets are usually organized in offshore jurisdictions which do not impose income taxes on residents. Trades are planned and executed by portfolio managers and traders who sit in the United States. The portfolio managers and the traders are employed either by the fund, or by a portfolio manager that transacts on behalf of the fund. All of the profit-making activity occurs within the United States. How can gain from this activity not be subject to United States taxation?

Because it is exempted by a statutory safe harbor. Generally, U.S. nonresidents who are not engaged in a U.S. trade or business are subject to a 30 percent U.S. gross withholding tax on fixed, determinable, annual, or periodic payments from U.S. sources (FDAP), subject to reduction in certain cases under treaties or domestic law. FDAP includes items generally thought of by non-tax specialists as fixed, determinable, or periodic, such as dividends, interest, rents, and royalties, but it has been expanded to include almost any income other than gain from the disposition of property.[1] By contrast, U.S. nonresidents that are engaged in a United States trade or business are subject to United States federal income tax on a net basis on all income that is effectively connected with their United States trade or business (their ECI).

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[1] For example, FDAP has been held to include U.S.-source slot machine winnings of a nonresident alien individual. Sang J. Park v. Commissioner, 136 T.C. 569 (2011).

There is no statutory or regulatory definition of a United States trade or business. However, the Internal Revenue Code (the "Code") includes two statutory safe harbors, and proposed treasury regulations include one more:

- Under Code section 864(b)(2), trading in stocks, securities, or commodities by a U.S. nonresident through a domestic broker or other independent agent does not constitute a United States trade or business. This exemption applies to U.S. nonresidents who are dealers in stocks, securities, and commodities, as well as to non-dealers.
- Under the same Code section, trading in stocks, securities, or commodities by a U.S. nonresident who is not a dealer in stocks, securities, or commodities is not a U.S. trade or business even if it is done by an employee or agent with discretionary authority located in the United States. This safe-harbor exempts a broader category of *activities* (i.e., trading through brokers and independent agents in the U.S. as well as trading through employees or dependent agents in the U.S.) from U.S. trade or business status for a narrower group of *taxpayers* (i.e., U.S. nonresidents who are not dealers in stocks, securities, or commodities).
- Under current proposed regulations, trading in derivatives on stocks, securities, and commodities in the U.S. by a U.S. nonresident that is not a dealer in stocks, securities, commodities, or derivatives does not constitute a United States trade or business.

This is why offshore funds can avoid United States income even if they have employees (or employees of a fund manager acting on their behalf) sitting in New York making investment decisions and pushing the BUY and SELL buttons. Since trading gain is generally gain from the disposition of property, it is not FDAP. So long as a fund is not a dealer in stocks, securities, commodities, or derivatives, and so long as the instruments it trades constitute stocks, securities, commodities, or derivatives, trading gains should not constitute ECI. This allows trading gains to escape taxation both as FDAP and as ECI.[2]

That is the good news. The bad news is that a fund may fall out of one or more statutory safe harbor if it trades instruments that do not constitute stocks, securities, commodities, or derivatives for relevant purposes, or if it engages in activities that do not constitute trading for these purposes. Common scenarios in which these issues may arise are discussed below.

a) Prohibited Instruments

- **MLPs:** Interests in master limited partnerships (MLPs) do not constitute stocks or securities for relevant purposes. Instead, interests in MLPs are treated as interests in partnerships. Under applicable law, a U.S. nonresident who owns an interest in a partnership that is engaged in a United States trade or business is treated as engaged in the partnership's United States trade or business, and the partner's distributive share of the partnership's net income is ECI to the extent that it is attributable to the partnership's United States trade or business. Additionally, the Internal Revenue Service (IRS) takes the position that a U.S. nonresident's gain from the disposition of an interest in a partnership that is engaged in a United States trade or business is ECI to the extent that it is attributable to assets of the partnership that are used in the partnership's United States trade or business.[3]

  Because MLPs are entities that are treated as partnerships for United States federal income tax purposes, and because most MLPs are engaged in activities such as mineral extraction, transportation, or refining that constitute trades or businesses within the United States, a fund that purchases these interests will be treated as having ECI to the extent of the income allocated to the fund on the MLP's K-1. In addition, if the fund sells interests in the MLP at a profit, there is a risk that the IRS could take the position that all or a portion of gain from the sale would be ECI.

  Certain transactions in MLP interests may not give rise to ECI. These include short positions in MLPs, certain derivatives on MLPs, and momentary ownership of MLPs (pursuant, for example, to an ETF creation strategy

[2] For example, FDAP has been held to include U.S.-source slot machine winnings of a nonresident alien individual. Sang J. Park v. Commissioner, 136 T.C. 569 (2011).

[3] This view was first expressed in a Revenue Ruling published in the early 1990s. Although many commentators (including the current author) have taken the view that this position is not consistent with existing statutory and case law, the IRS has recently stated that it still adheres to it. Rev. Rul. 91-32, 1991-1 C.B. 107; FAA 20123903F (9/28/2012).

or short covering). Offshore funds should consult with their tax advisors before engaging in these activities.

To summarize – MLPs have ticker symbols and are traded on stock exchanges, but they are not stocks. Handle with caution!

> **Real Estate Companies and REITs:** Gain of a U.S. nonresident from the disposition of United States real property is treated as ECI. For these purposes, shares in a corporation more than 50 percent of whose real estate and business assets consist of United States real property are themselves treated as United States real property. However, gain from the disposition of shares in such a corporation is not treated as ECI if (i) the shares are regularly traded on an established securities market, and (ii) the seller did not own more than 5 percent of the applicable class of shares at any time during the preceding five years.

The practical effect of the foregoing rule is that offshore funds should approach shares in equity REITs with caution:

- **Closely Held Corps:** Prior to investing in a closely-held U.S. resident corporation, an offshore fund should examine its balance sheet to determine whether 50 percent or more of its relevant assets consist of United States real property assets. If it is a "land-rich" company of this type, outright or derivative ownership should be avoided, or held through a "blocker" corporation (described below).

  It is worth noting that, because certain companies such as mining companies and oil and gas exploration and pipeline companies, hold large amounts of assets that are considered United States real property, they may be treated as "land-rich" companies for these purposes, even though their primary business is not holding United States real estate.

  5 Percent Limitation: To the extent that shares purchased by the fund are traded on an established securities market, there is a good chance that gain from the disposition thereof should not give rise to ECI, so long as the fund will never own 5 percent of the applicable class of shares.
  Derivative and Cash Exposure: Notwithstanding the foregoing, if a fund acquires derivative exposure to REIT shares that, if aggregated with direct exposure, would cross the 5 percent threshold, there could be a risk that gain from the disposition of either the shares or the derivatives could give rise to ECI.
- **Counterparty Hedges:** In cases in which a fund acquires derivative exposure to a REIT with an offshore counterparty, the fund should resist efforts on the part of the counterparty to have the fund contractually assume the risk that the counterparty could have ECI because the counterparty's ownership of REIT shares held as a hedge, aggregated with other shares in the same REIT held independently of the hedge, could push the counterparty over the 5 percent threshold.

> **Distressed Debt:** Ownership of distressed debt issued by a United States resident ought not cause an offshore fund to have ECI per se. However, certain activities engaged in pursuant to ownership of deeply distressed or defaulted debt may cause a U.S. nonresident to be treated as engaged in a United States trade or business:

- **Foreclosures:** If an offshore fund forecloses on a loan that is secured by property that is used in a United States trade or business, the fund runs the risk of being treated as engaged therein. As discussed above, all gain of a U.S. nonresident from the disposition of United States real property is treated as ECI. Therefore, if an offshore fund forecloses on a mortgage secured by United States real property, there is a significant risk that the fund could have ECI from the disposition of the real property.

- **Debtor in Possession:** If an offshore fund acts as debtor in possession of a United States trade or business owned by an issuer of defaulted debt, there is a risk that income earned from that business by the fund could be treated as ECI.

- **Debt Modifications:** A significant modification of a debt instrument is treated as the exchange of one debt instrument (the unmodified debt instrument, or the "old" debt instrument) for a new debt

instrument (the modified debt instrument) and the extinguishment of the old debt instrument. Since this is treated as the exchange of property (i.e., the old debt instrument) for the issuance of a new debt instrument, there is a risk that an offshore fund that modifies debt of a United States-resident borrower could be treated as lending to that borrower for United States federal income tax purposes. If this is done on a continuous basis, there is a corresponding risk that the fund could be treated as engaged in a United States lending business.

Offshore funds that intend to hold significant quantities of distressed debt, and which anticipate engaging in any of the actions described above, would be well advised to put the distressed debt and these activities in a "blocker" corporation, to isolate those assets and activities from non-ECI producing activities.

- **Second-Order Derivatives – the VIX:** Traders may be surprised to know that it is unclear whether VIX-referenced instruments, such as futures contracts on the VIX and VIX ETFs and ETNs, qualify as "stocks, securities, or derivatives" for relevant purposes. The better answer appears to be that these instruments ought to constitute "derivatives" for these purposes. This is because a "derivative" includes a derivative on an equity index, and the VIX references the volatility of the S&P 500 Index. However, neither courts nor the IRS have addressed the issue of whether a second-order derivative on an equity index constitutes a "derivative," as defined. As a best practice, offshore funds intending to enter into transactions in VIX-referenced instruments should seek advice on this point.

- **Physical Commodities:** Although trading in commodities is exempt from the definition of a United States trade or business for federal income tax purposes, state income, sales, and property tax laws do not always follow this rule. Therefore, an offshore fund that holds, say, warrants in physical metals stored in LME warehouses within the United States or physical oil located within the United States would be well advised to check with its tax advisors about the potential state and local tax consequences thereof.

b) **Prohibited Activities**

- **Dealing in the U.S.:** As discussed above, the safe harbor for trading in stocks, securities, commodities, or derivatives through employees or dependent agents in the United States is only available for funds that are not dealers in these instruments; therefore, it is crucial that an offshore fund managed by a U.S. manager seeking to avoid ECI not be a dealer. Generally, a dealer is a taxpayer who makes money by charging a fee for providing liquidity to customers (i.e., differently-situated taxpayers who may not be able to access the market absent the dealer's help). By contrast, a "trader" is a taxpayer who makes money from short-term changes in asset prices or from inefficiencies in the prices of correlated assets, and an "investor" is a taxpayer who uses a buy-and-hold strategy. A full discussion of what activities may constitute "dealing" for relevant purposes is outside the scope of this alert. However, the following factual scenarios include a few common factors that may be indicative of whether an offshore fund is a dealer:

    - **Fund Holds Itself Out to the Public:** If a fund holds itself out to the public as a buyer or seller of last resort, there is a significant risk that it could be treated as a dealer.

  Registration as a Market Maker: The fact that a fund registers as a market maker in a security is generally indicative of dealer status. However, there could be special instances in which a fund registers as a market maker for reasons relevant to its trading strategy in which the fund would not be treated as a dealer. For example, if a fund engaged in a low-latency trading strategy registered as a market maker in order to access an exemption to the pre-locate requirement, and only posted *de minimis* bids and offers as far from the market as possible, the risk that it would be treated as a dealer may be significantly diminished.

    - **Charging or Paying a Commission:** If a fund interacts solely with sell-side broker-dealer counterparties that charge it a commission for executing trades, the fund ought not be treated as a dealer. By contrast, if a fund regularly interacts with retail customers, or with other buy-side parties, which it charges a commission, there would be a significant risk that the fund could be treated as a dealer.

    - **Trades Placed Solely on an Exchange:** If a fund places trades exclusively on an exchange through brokers

who are members of the exchange, there should be little risk that the fund should be treated as a dealer.

An offshore fund should consult with its tax advisor if it engages in any activity other than entering into trades with broker-dealers who charge a commission, or with similarly-situated counterparties.

> **Lending into the U.S.:** One of the most frequently – asked questions of tax advisors to offshore funds is whether the acquisition of new debt from domestic issuers by a fund should cause the fund to be engaged in a United States trade or business. Although purchasing bonds and loans on the secondary market should fit within the "stocks and securities" safe harbor described above, there is a significant risk that regular, direct purchases of bonds or loans at original issue from United States borrowers could cause a fund to be treated as engaged in a United States lending business. The current lack of authority directly on point urges caution in this matter.

Offshore funds seeking to reduce the risk of ECI from a deemed U.S. lending business often adopt trading guidelines intended to ensure that debt instruments acquired by the fund be purchased only on the secondary market. These guidelines tend to be quite detailed; however, they generally target the following points:

- **No Privity with the Issuer:** There can be no direct communication between the fund and the borrower/issuer other than regular due diligence performed by a reasonable purchaser. The fund cannot negotiate the terms of the loan/bonds. The arranger/underwriter cannot hold themselves out as the fund's agent, and the fund cannot say that the arranger/underwriter is acting on its behalf. The fund cannot enter into any direct contractual relationship with the borrower/issuer.

- **Independent Source of Funds:** Funds received by the borrower/issuer must come from a source other than the fund. Any forward commitment to purchase loans or bonds must be entered into at least a day after the arranger/borrower has agreed to fund the debt and the terms have been fixed. Forward commitments should be subject to a "material adverse event" clause.

- **Seasoning**: Loans/bonds should be adequately "seasoned" prior to purchase by the fund. In the case of loans/bonds originated by unrelated parties, the fund should purchase the debt no less than 48 hours after funding. In the case of debt issued by an affiliated party, debt should be purchased no less than 30 to 90 days after funding, and the affiliated party should be fully exposed to the risk of ownership during this time.

- **Position Size:** The fund should acquire no more than a certain portion of any loan facility or bond issuance.

- **Unfunded Commitments:** Limitations generally apply to the acquisition of unfunded commitments. In no event should the terms of a post-acquisition draw down be subject to any negotiation post acquisition.

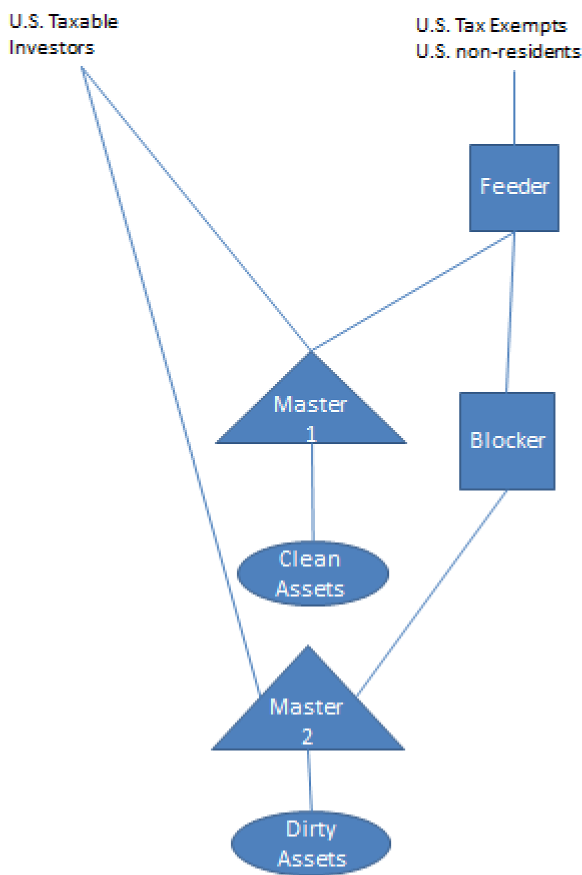
- **Other Income:** The fund should not receive any income other than interest or gain from the disposition of the debt. "Bad" other income could include fees for services, underwriting fees, or banking fees.

The foregoing list should not be taken as sample guidelines, and the most detailed guidelines are not an impenetrable defense to government attack. For example, even if an offshore fund only buys loans or bonds that have been appropriately "seasoned," there will always be a risk that the issuer could be treated as the fund's agent in the United States if the originator and the fund engage in a long-term course of dealing with each other. Punctilious adherence to detailed guidelines can minimize this risk, but cannot eliminate it. Funds seeking to purchase loans or bonds near original issue should consult with their tax advisors to set up detailed guidelines applicable to their trading strategy.

2) **Structuring Alternatives:** The foregoing sections discussed ways for an offshore fund to minimize the risk that it could be treated as engaged in a trade or business in the United States. However, in certain cases, it will be inevitable that a fund will be engaged in a trade or business in the United States. For example, a fund may be organized for the express purpose of purchasing loans at original issue, or working out distressed debt. In that case, a structuring solution may be used to either contain the damage or to avoid it.

a) **Parallel Funds:** In the parallel fund structure, "clean" assets (i.e., assets that do not give rise to ECI) are held separately from "dirty" assets (i.e., assets that do give rise to ECI). This has the effect of isolating the pernicious effect of the dirty assets. The structure is illustrated in Chart 1:[4]

Chart 1: Parallel Fund Structure



The effect of holding dirty assets through a foreign feeder fund is to isolate the activity that could cause the fund to be treated as engaged in a U.S. trade or business. This ensures that income from the clean assets will not be tainted by association with an actual or imputed United States trade or business of the fund.

b) **Treaty Jurisdictions:** Another solution to the problem of ECI is the use of treaty jurisdictions. From an ivory-tower perspective, this solution is better than the parallel fund structure, because it has the potential to eliminate or significantly reduce ECI, rather than to merely isolate it. However, it presents certain real-world obstacles.

By way of background – tax treaties are agreements between two jurisdictions, i.e., the "residence country," or the country where the tax payer is tax-resident, and the "source country," or the country where the source of income is located. For our purposes, the taxpayer will generally be a fund organized in the residence country, and the source country will be the United States.

> **Example 1:** A French tax resident holds bonds issued by ABC Corp., a United States resident corporation.. A coupon is paid. Under the United States-France income tax treaty, the United States is the source country, France is the residence country, and the coupon payment is the item of income at issue.

[4] U.S. tax-exempt investors hold their interests in an offshore feeder entity treated as a corporation for United States federal income tax purposes in order to avoid recognition of unrelated business taxable income (UBTI), in case Master 1 borrows to acquire investments. UBTI, and debt-financed income, will be the subject of a subsequent alert.

Tax treaties are entered into to ensure that income from transactions entered into between source country and residence country residents are not taxed twice. Under international law principles, to the extent that a treaty applies, its rules generally "trump" those of domestic law.[5]

Most income tax treaties exempt business profits from source-country taxation so long as these items are not attributable to a "permanent establishment" (PE) in the source country. For these purposes, a PE is generally a branch, office, factory, workshop, or other fixed place of business.

> **Example 2:** A fund organized in jurisdiction X is engaged in a lending business. It regularly purchases bonds and syndicated loans at original issue. It also takes in high-grade assets on "reverse repo" with lower-grade credit quality counterparties. The fund does not have any employees based in the U.S., does not have a branch in the U.S., and does not have any "dependent agents" working on its behalf in the U.S. Its employees spend no more than a *de minimis* amount of time physically present in the U.S. Its contacts with counterparties located in the U.S. is primarily through telephone calls and email, face-to-face meetings that occur outside the U.S., and quarterly meetings in the U.S.
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> Because the fund does not have a branch, office, or other fixed place of business in the U.S., and because its employees do not spend more than a *de minimis* amount of time in the U.S., it does not have a PE in the United States.

The concept of a permanent establishment is similar to, but not the same as, that of a trade or business within the United States, for two reasons:

- **Treaty vs. Domestic Law:** PE is a creature of treaty law, while the rule that a U.S. nonresident's trade or business within the United States is subject to United States income tax on a net basis is a rule of domestic law. Therefore, if a tax treaty applies, the relevant question is whether the taxpayer's business profits are attributable to a PE in the United States – not whether the taxpayer has a trade or business in the United States.

- **PE is Narrower:** The concept of a U.S. PE is narrower than that of a trade or business in the United States. It is possible to be engaged in a trade or business within the United States, without having a PE, but it is highly unlikely that a taxpayer could have a U.S. PE without being engaged in a U.S. trade or business. This is because a U.S. trade or business is generally defined as a set of activities that a taxpayer engages in, while a PE is a fixed place of business through which a taxpayer engages in business activities. It is possible to engage in business activities without having a fixed place of business, but not vice versa.

The net effect of the foregoing is that, in certain instances, activities of a U.S. nonresident that does not have a PE may be exempt from tax if the U.S. nonresident is a resident of an applicable treaty jurisdiction *even if those activities constitute a trade or business in the U.S.*

> **Example 3:** The facts are the same as in example two, except Jurisdiction X has a treaty with the U.S. that exempts business profits from source-country tax except to the extent that they are attributable to a source-country PE. Because the fund does not have a branch or fixed place of business in the U.S. and does not have a dependent agent in the U.S., and because the fund's employees do not spend enough time in the U.S. to "set up shop" stateside, income from the fund's lending activities ought not be taxable in the U.S., even though those activities would give rise to ECI, absent application of the business profits article in the Jurisdiction X tax treaty.

Funds formed to purchase U.S. – issued debt at original issue, or to lend to U.S. borrowers, may be able to profit from the foregoing by organizing in a treaty jurisdiction. To the extent that their activities are not attributable to a U.S. PE, income from these activities should not be subject to U.S. income tax. If the residence jurisdiction does not itself tax the fund's income, this would appear to be the holy grail – no source-country tax and no residence-country tax. That is possible in some cases. However, some caveats are in order:

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[5] Under general international law principles, a treaty rule is superior in force to a rule of domestic law. However, under the U.S. Constitution, treaties are granted a force equal to that of federal statutes. In practice this means that U.S. courts will make every effort to construe treaties and the Code in such a way as to give effect to both. However, in the case of a clear intent on the part of Congress to override a treaty provision, courts will override a treaty rule in order to enforce a subsequently-passed Code section.

- **No PE Means No PE:** The fund may not be managed by a U.S.–based manager or other dependent agent, and the fund cannot have any U.S.-based employees. Visits by fund employees to the U.S. must be strictly monitored to ensure that the fund does not inadvertently establish a U.S. PE.

- **Limitation on Benefits Clauses:** Most newer United States tax treaties contain a limitation on benefits clause, which limits the availability of treaty benefits to “true” residents of the residence country. While the purpose of these clauses is to prevent treaty shopping by foreign investors who set up entities in the residence country, the definition of “true resident” tends to be technical, and varies from treaty to treaty. Although each situation is unique, a fund whose owners are resident in countries other than the fund’s jurisdiction of residence tend to run afoul of limitation on benefits provisions. That said, funds whose owners are resident in countries which have a treaty with the United States, or whose owners are resident in the EU or in NAFTA countries, are more likely to qualify under an applicable limitation on benefits provision than funds whose owners are not so resident. Careful attention to the limitation on benefits clause in the applicable treaty is important in these cases.

- **There May be Some Residence-Country Tax:** Traditional tax havens, such as the Cayman Islands, generally do not have tax treaties with the United States. Some jurisdictions with significantly lower rates of income tax, such as Ireland and Barbados, do have tax treaties with the United States with PE clauses. That said, some residual residence-country income tax may be due.

- **Antideferral Rules May Apply to U.S. Investors:** If U.S. investors purchase interests in the fund, there might be a risk that they could be subject to United States federal income tax currently on their share of the fund’s income under one of the domestic “antideferral rules” that apply to U.S. owners of certain foreign entities. If this were the case, these investors would be better off if the relevant activities were carried on through a domestic fund.

This *GT Alert* was prepared by **John Kaufmann**. Questions about this information can be directed to:

- John Kaufmann | +1 212.801.2147 | kaufmannj@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+ 31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 (1) 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (21) 6391 6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Tokyo¤
+81 (0)3 4510 2200

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900

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