

# The Slow Death of the Section 385 Regulations

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Internal Revenue Code (Code) Section 385 provides that the US Department of the Treasury (Treasury) is authorized to issue regulations to determine whether an interest in a corporation is to be treated for purposes of the Code as stock or indebtedness. After decades of inaction, proposed regulations were issued on April 14, 2016. The proposed regulations were not well-received; the tax bar had serious and substantial comments to the proposed regulations. Among the most important critiques, there were criticisms for the potential overbreadth of the regulations' application to foreign-to-foreign transactions, the lack of a *de minimis* exception for smaller companies and for the anticipated burden of the contemporaneous documentation requirements.

Treasury released final regulations under Code Section 385, which are effective as of October 21, 2016. Although the proposed regulations were changed in some respects, the final regulations retained strict documentation requirements.

In Executive Order 13789, the President called on Treasury to identify and reduce tax regulatory burdens that impose undue financial burdens on US taxpayers, or otherwise add undue complexity to federal tax law. In response, Treasury indicated on October 2, 2017, that it would potentially revoke the documentation requirements under the proposed regulations.

According to media reports, the government will soon propose to revoke the loan documentation requirements. If the rules are revoked, the government would likely work on new replacement regulations but that process could take a substantial amount of time. We will continue to monitor developments related to Code Section 385 and provide any updates.

Prior coverage of the Code Section 385 Regulations can be found in our previously posted articles.

- [SALT Implications of Final Section 385 Debt-Equity Regulations](#)
- [Tax Bar Has Serious and Substantial Comments to the Proposed IRC Section 385 Regulations](#)
- [Treasury Releases Report on Reducing Tax Regulatory Burdens](#)
- [Debt-Equity Regulations – A Year in Review](#)

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- [Inversions and Debt/Equity Regulations Top Treasury's 2016–2017 Priority Guidance Plan](#)

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