

Understanding Tax Provisions in M&A Agreements

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Gladriel Shobe, *Private Benefits in Public Offerings: Tax Receivable Agreements in IPOs*, **Vand. L. Rev.** (forthcoming 2018), available at [SSRN](#).

In *Private Benefits in Public Offerings*, Prof. Shobe describes the emergence and evolution of a fascinating term in initial public offerings: tax receivable agreements (TRAs). These agreements reserve for the pre-IPO owners of the business the economic value of certain tax attributes that are either created in the course of the IPO or which were created over a course of years before the IPO. TRAs are contracts between the post-IPO corporation and the pre-IPO owners, pursuant to which the corporation makes distributions to those pre-IPO owners as tax assets are used. In one variation, pre-IPO owners receive the economic benefit of basis step ups that arise in certain “turbocharged” IPOs, and in other variations the pre-IPO owners receive the economic benefit of net operating losses and historical basis in the corporation’s assets.

Shobe then goes on to evaluate the fairness of these agreements. One view that motivates her discussion is that tax assets are underpriced in IPOs, and that TRAs are one way of ensuring that the pre-IPO owners receive a “fair price” for these assets. The opposing view is that the tax assets are properly valued in IPOs already, so that the TRAs allow pre-IPO owners to extract a greater purchase price from new investors than they otherwise would, and perhaps should.

One important contribution of the paper is to describe how these agreements work, and to document how they have both proliferated and mutated into different forms. Shobe teaches the reader a great deal about this feature of IPOs and make some important observations about how they operate. Her work raises the question of why certain variants of the TRA were adopted in some IPOs and other variants were adopted in others, and why TRAs that convey the benefits of net operating losses and historical basis have become increasingly popular over time. Exploring the relationship between the form of the TRA and other characteristics of the IPO might help explain what function they serve.

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