

# SULLIVAN & CROMWELL LLP

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## Lawyers



### David P. Hariton

Partner

#### New York

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#### PRACTICES & CAPABILITIES

**Commodities, Futures & Derivatives**

**Tax**

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#### EDUCATION

**1985, Stanford Law School, J.D.**

**1981, Stanford University, A.B.**

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#### BAR ADMISSIONS

**New York**

David Hariton is a leading expert on the U.S. tax treatment of financial instruments and transactions, corporate restructurings, leveraged finance, insolvency and cross-border investments. He advises many leading financial institutions, including Barclays, Citadel, Citigroup, Credit Suisse, Goldman Sachs, JP Morgan Chase, PayPal, Inc. and Société Générale. In that capacity, he has been involved in the initial development of many new financial instruments, including trust preferred securities in the 1990s, debt-equity units in the 2000s, and a variety of other exchangeable and convertible instruments. He routinely represents clients in connection with major financial transactions and helps multinational corporations organize their operations in ways that are more efficient for U.S. tax purposes. He has acted for more than 20 years as principal outside counsel to the securities industry and has in that capacity written a large number of reports and letters on industry-wide issues to Treasury and the IRS, and has led various lobbying initiatives. Mr. Hariton has also advised numerous clients in respect of controversies at the audit and appellate levels dealing with financial instruments and transactions and has developed arguments and insights that have persuaded the IRS not to propose adjustments.

#### **Professional Activities**

Mr. Hariton chaired the Tax Section of the New York State Bar Association in 2005 and is a member of the Tax Forum and the Tax Club. He also frequently speaks before the IRS and other governmental entities and for such private organizations as the University of Chicago Law School, NYU Law School, Columbia Law School, the University of Virginia Law School, the Wall Street Tax Association, the Practising Law Institute, the American Bar Association and the New York State Bar Association.

#### **Publications**

Mr. Hariton has published more than 60 articles and reports on the tax treatment of financial instruments and transactions, many of which are frequently cited in the tax literature by professors and practitioners. Selected articles include:

- “The Frame Game: How Defining the Transaction Decides the Case,” 63 TAX LAWYER 1-42 (Fall, 2009).
- “Equity Derivatives, Inbound Capital and Outbound Withholding Tax,” 60 TAX LAWYER 313-38 (2007).
- “When and How Should the Economic Substance Doctrine be Applied?” 60 TAX LAW REVIEW 29-56 (2006).
- “Kafka and the Tax Shelter,” 57 TAX LAW REVIEW 1-36 (2003).
- “Tax Benefits, Tax Administration, and Legislative Intent,” 53 TAX LAWYER 579-614 (2000).
- “Sorting out the Tangle of Economic Substance,” 52 TAX LAWYER 235-273 (1999).
- “The Accrual of Interest on Derivative Instruments: Where Do We Go From Here?” 74 TAXES: THE TAX MAGAZINE 1011-1022 (1996) (49th Annual Federal Tax Conference of the University of Chicago Law School).
- “The Tax Treatment of Hedge Positions in Stock: What Hath Technical Analysis Wrought?” 50 TAX LAW REVIEW 803-827 (1995).
- “Withholding on Cross-Border Stock Loans and Other Equity Derivatives,” 72 TAXES: THE TAX MAGAZINE 1050-1060 (1994) (47th Annual Federal Tax Conference of the University of Chicago Law School).
- “Distinguishing Between Equity and Debt in the New Financial Environment,” 49 TAX LAW REVIEW 499-524 (1994).
- “The Taxation of Complex Financial Instruments,” 43 TAX LAW REVIEW, 731-788 (1988).
- “Recapitalizations: the Issuer’s Treatment,” 40 TAX LAWYER 873-904, (1987).
- “Taxing Equity Swaps: Don’t Throw Out the Baby With the Bath Water,” 08 TAX NOTES 1203-04 (Sept. 22, 2008).
- “Stop Calling it Economic Substance,” 99 TAX NOTES 1543-1545 (June 9, 2003).
- “How to Fix Economic Substance,” 99 TAX NOTES 539-543 (April 28, 2003).
- “Economic Substance Complaint No. 1: ‘Too Vague and Too Broad,’” 96 TAX NOTES 1893-1894 (Sept. 30, 2002).
- “Conventional and Contingent Convertibles: Double or Nothing,” 96 TAX NOTES 123-126 (July 1, 2002).
- “Confusion About Swaps and Rev. Rul. 2002-30,” 95 TAX NOTES 1211-1213 (May 20, 2002).
- “The Compaq Case, Notice 98-5, and Tax Shelters: the Theory is All Wrong,” 94 TAX NOTES 501-509 (Jan. 28, 2002).
- “Treasury’s Proposal to Codify the Economic Substance Doctrine,” 88 TAX NOTES 937-947 (Aug. 14, 2000).

- “How to Define ‘Corporate Tax Shelter,’” 84 TAX NOTES 883-893 (Aug. 9, 1999).
- “Comments on Inflation Indexed Treasury Securities,” 72 TAX NOTES 519-523 (July 22, 1996).
- “Contingent Debt: Putting the Pieces Together,” 58 TAX NOTES 1231-1243 (Mar. 1, 1993).
- “Significant Changes in the Original Issue Discount Rules,” 58 TAX NOTES 347-356 (Jan. 18, 1993).
- “New Foreign Currency Debt Regulations - An Analysis and a Recommendation,” 56 TAX NOTES 1201-1214 (Aug. 31, 1992).
- “New Rules Bifurcating Contingent Debt- a Mistake?” 51 TAX NOTES 235-239 (Apr. 15, 1991).

### **Rankings and Recognitions**

Mr. Hariton is consistently ranked by Chambers and other industry publications as among the top few U.S. tax lawyers dealing with financial transactions and instruments. Summaries in their publications generally cite his exceptional knowledge, insight and judgment in respect of complex transactions and the rules that apply to them.

- *Chambers USA: America’s Leading Lawyers for Business* (2007-2020)—Consistently recognized as a Band 1-ranked lawyer in the area of Tax (New York). Clients describe him as “brilliant in every topic.”
- *Chambers USA: America’s Leading Lawyers for Business* (2003-2006)—Consistently recognized as a Band 1-ranked lawyer in the area of Tax: Financial Products (New York).
- *Chambers Global: The World’s Leading Lawyers for Business* (2001-2005)—Consistently recognized as a Band 1-ranked lawyer in the area of Tax: Financial Products (United States).
- *Chambers Global: The World’s Leading Lawyers for Business* (2007-2018)—Currently recognized as a Band 1-ranked lawyer in the area of Tax: Corporate (United States), with “‘an enormous amount of authority and respect’ in the financial products area.”
- *The Legal 500 United States* (2007-2018)—Recognized since 2009 as a top-ranked “Leading Lawyer” in the area of Tax: Financial Products, “who includes expertise in financial instruments within a truly impressive practice.” Named to the “Hall of Fame” (2017).
- *The Best Lawyers in America* (2006-2018)—Currently recognized as a leading lawyer in the areas of Litigation & Controversy—Tax and Tax Law, with clients calling him “one of the top tax lawyers on Wall Street.”
- *PLC Which Lawyer? Yearbook* (formerly *Global Counsel 3000*) (2002-2011)—Currently recognized as a

“Recommended Lawyer” in the area of Tax (United States and New York).

- *PLC Cross-border Tax on Corporate Transactions Handbook* (2007-2009).
- *Euromoney’s Guide to the World’s Leading Tax Advisers* (2008)—Recognized as a leading Tax Adviser in the United States.
- *New York Super Lawyers* (2006-2017)—Consistently recognized as a leading tax lawyer in areas ranging from Real Estate to Projects to Securities & Corporate Finance.
- *The International Who’s Who of Corporate Tax Lawyers*—Consistently recognized as a leading tax lawyer in the area of Corporate Tax.
- *The International Who’s Who of Business Lawyers*—Currently recognized as a leading lawyer in the area of Tax.

#### SELECTED REPRESENTATIONS

- Played a principal role in developing “trust preferred securities,” which dominated the preferred issuance marketplace throughout the 1990s. Successfully explained the structure to the Treasury Department, thereby avoiding potentially adverse regulatory action, and later successfully explained the structure to the IRS in response to questions raised on audit.
- Has recently played a principal role in developing other novel financial instruments that have preserved desirable issuer regulatory treatment, such as Tier One Capital, while still paying tax-deductible interest.
- Has recently assisted numerous issuers in the remarketing of debt in debt-equity units described in Rev. Rul. 2003-97.
- Has recently helped various financial institutions deal with the complex tax consequences of restructuring large portfolios of collateralized debt obligations and similar assets, including in the international context.
- Has co-led a team preparing tax disclosures for more than 1,000 structured notes that are indexed in complex and novel ways to the returns on equities, commodities, currencies, financial indexes, and financial formulas.
- Has successfully persuaded the IRS to drop plans to propose assessments in respect of a variety of financial transactions, including:
  - a transaction the IRS sought to label as a “foreign tax credit generator”;
  - various cross-border arbitrage transactions not involving U.S. foreign tax credits;

- a prepaid forward contract described in Rev. Rul. 2003-7; and
- an equity forward contract on the issuer's own stock.
- Has routinely helped clients deal with IRS challenges, and/or obtain settlements, in respect of tax-advantaged financial structures, including:
  - foreign tax credit related transactions of the sort described in *Compaq v. Commissioner*;
  - proposed withholding tax liabilities in respect of securities loans or equity swaps;
  - alleged "foreign tax credit generators"; and
  - transactions relating to other kinds of deductions, credits and losses.