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IRS AND TREASURY ISSUE INTERIM GUIDANCE ON NEW STOCK BUYBACK EXCISE TAX

To Our Clients and Friends:

The Inflation Reduction Act of 2022[1] was signed into law by President Biden on August 16, 2022 and added new section 4501 to the Internal Revenue Code,[2] imposing an excise tax on certain repurchases of corporate stock. The new provision applies to repurchases of stock after December 31, 2022. On December 27, 2022, the Internal Revenue Service (the "IRS") and the Department of the Treasury ("Treasury") issued Notice 2023-2 (the "Notice") to provide taxpayers with interim guidance addressing the application of the new excise tax.

The Statute

New section 4501(a) imposes a tax equal to one percent of the fair market value of any stock of a "covered corporation" that is repurchased by that corporation (and certain affiliates) during the taxable year. The statute defines a "covered corporation" to include any domestic corporation the stock of which is traded on an established securities market[3] and defines a "repurchase" that triggers the excise tax as a redemption described in section 317(b), with certain exceptions, as well as any transaction determined by the Secretary of the Treasury (the "Secretary") to be an "economically similar" transaction.[4]

The value of stock repurchases subject to the excise tax is reduced by the fair market value of any repurchases that fall within one of six statutory exceptions,[5] including repurchases in connection with certain corporate reorganizations, repurchases under a $1 million *de minimis* threshold, and repurchases in connection with certain retirement plan contributions. The stock repurchase excise tax base also is reduced by the fair market value of any issuances of the covered corporation's stock during its taxable year (the "netting rule").[6] No income tax deduction is allowed for the payment of the excise tax.[7]

The statute provides the Secretary with authority to prescribe regulations and other guidance as necessary to carry out and prevent the avoidance of the purposes of the excise tax, to address special classes of stock and preferred stock, and to provide for the application of rules involving the acquisition of the stock of certain foreign corporations.[8]

Notice 2023-2: Key Provisions

Notice 2023-2 provides initial guidance and operating rules for the excise tax, including some welcome news, but does not provide all of the relief for which taxpayers and practitioners had advocated. It also previews anticipated procedures for reporting and paying the tax and requests comments on various aspects of the tax and the implementation of the tax. The IRS and Treasury have imposed a 60-day deadline for comments, although the first day of that 60-day period does not begin until the Notice is

published in the Internal Revenue Bulletin, which could be as early as this week. The following discussion is a high-level summary of the most notable provisions in the Notice.

Definitions: "Redemptions" and "Economically Similar Transactions"

Consistent with section 4501(c)(1), the Notice states that, for purposes of the stock repurchase excise tax, a repurchase means either a section 317(b) redemption or an economically similar transaction.[9] The Notice goes on to provide two exceptions to the section 317(b) rule, as well as lists of transactions that are economically similar and transactions that are not economically similar.

Section 317(b) Redemptions Carved Out of Repurchase Treatment

As noted above, the Code contains six exceptions to repurchase treatment.[10] The Notice provides an exclusive list of section 317(b) redemptions that are not treated as repurchases for purposes of the excise tax:[11]

- *Section 304(a)(1) transactions*. Under section 304(a)(1), a transaction involving two commonly controlled corporations in which one corporation acquires the shares of the second corporation from the controlling person(s) is treated as a distribution in redemption of the acquiring corporation's deemed issued stock. The Notice provides that the deemed redemption is not a repurchase for purposes of the excise tax regardless of whether section 302(a) or (d) applies to the deemed redemption, while also disregarding the stock deemed issued under section 304(a)(1) for purposes of the netting rule (discussed below).[12]

- *Payments of cash in lieu of fractional shares*. A payment by a covered corporation of cash in lieu of the issuance of a fractional share in connection with a section 368(a) reorganization, a section 355 distribution, or pursuant to the settlement of an option or similar financial instrument is not treated as a section 317(b) redemption if the cash received by the shareholder in lieu of the fractional share represents a mere rounding off of the shares issued in the exchange or settlement, the payment is carried out solely for administrative convenience or other non-tax reasons, and the amount of cash paid to the shareholder in lieu of a fractional share does not exceed the value of one full share of the stock of the covered corporation.[13]

Economically Similar Transactions

Section 4501(c)(1)(B) authorizes the IRS and Treasury to issue regulations applying the stock repurchase excise tax to "economically similar transactions" that may not fit the technical definition of a section 317(b) redemption. The Notice provides an exclusive list of five transactions that the IRS and Treasury have deemed to be economically similar transactions:[14]

1. *Acquisitive reorganizations*. The exchange by shareholders of a target covered corporation of their target corporation stock in a reorganization is economically similar to a repurchase by the target corporation. Notably, although the term "acquisition reorganization" does not include section 368(a)(1)(B) reorganizations, it does include reorganizations qualifying under section 368(a)(1)(A) by reason of section 368(a)(2)(E).[15]

2. *Recapitalizations*. The exchange by shareholders of a covered corporation of their stock in the covered corporation for new stock issued by the covered corporation in a recapitalization described in section 368(a)(1)(E) is economically similar to a repurchase by the recapitalizing covered corporation.

3. *F reorganizations*. The exchange by shareholders of a covered corporation of their stock in the transferor corporation (as defined in Treas. Reg. § 1.368-2(m)(1)) as part of a reorganization described in section 368(a)(1)(F) is economically similar to a repurchase by the transferor corporation.

4. *Split-offs*. In the case of a split-off by a covered corporation pursuant to section 355 and section 356 as it relates to section 355, the exchange by the distributing corporation's shareholders of their distributing corporation stock for controlled corporation stock or other property is economically similar to a repurchase by the distributing corporation.

5. *Complete liquidations to which both section 331 and section 332 apply*. If a covered corporation liquidates in a transaction to which section 331 applies to certain shareholders and section 332 applies to other shareholders, the section 331 components are economically similar to repurchases by the covered corporation, whereas the section 332 components are not repurchases.[16]

Although, at first blush, the inclusion of tax-free transactions on the "demon" list of economically similar transactions may be disturbing, the "qualifying property exception," discussed below, should reduce the repurchase amount to zero if there is no boot (other than cash in lieu of fractional shares) involved in the transaction.

Not Economically Similar Transactions

The Notice also includes a nonexclusive list of transactions that are treated as not economically similar to a repurchase, although the list identifies only two such transactions: complete liquidations covered solely by section 331 or by section 332(a), and divisive section 355 transactions other than split-offs.[17]

Three points regarding the "angel" list bear mentioning. First, because this "angel" list is nonexclusive (and the "demon list" is exclusive), taxpayers presumably have the ability to treat other similar transactions as not economically similar to a repurchase, especially given that section 3.04(4)(a) of the Notice provides an exclusive list of economically similar transactions.[18] Second, the inclusion of section 331 complete liquidations on the list should provide welcome relief to many special purpose acquisition companies (commonly known as "SPACs"), for which the potential application of the excise tax to their unwinds presented challenging issues.[19] Third, the Notice does not state that section 331 liquidations are not treated as section 317(b) redemptions, leaving some uncertainty that would benefit from clarification.[20]

Specified Affiliates and Surrogate Foreign Corporations

Section 4501(c)(2)(A) treats the acquisition of stock of a covered corporation by a specified affiliate of that covered corporation, from a person that is not the covered corporation or a specified affiliate of the covered corporation, as a repurchase by the covered corporation. Section 4501(d) includes special rules with respect to acquisitions of stock of certain foreign corporations and certain surrogate foreign corporations (*i.e.*, foreign corporations that are subject to the anti-inversion provisions of section 7874).[21] The Notice provides additional detail as to when these provisions are triggered, including by adding a *per se* rule in situations in which a transaction is undertaken with a principal purpose of avoiding the stock repurchase excise tax.

Fair Market Value of Repurchased Stock

Although section 4501 imposes an excise tax on stock repurchases within a particular tax year, the statute does not specifically address how and when the repurchased stock is valued. Section 3.06 of the Notice fills in some of these timing and valuation details. Under this portion of the Notice, stock is treated as repurchased at the time that ownership of the stock transfers to the covered corporation or to the applicable acquiror for federal income tax purposes (or, in the case of economically similar transactions, at the time of the exchange).

The Notice first provides that the fair market value of repurchased stock is its market price (regardless of whether the market price is the price at which the stock was repurchased). The Notice then prescribes four methods for determining the market price of repurchased stock that is traded on an established securities market: (i) the daily volume-weighted average price on the repurchase date; (ii) the price at the close of day on the repurchase date; (iii) the average of the high and low prices on the repurchase date; and (iv) the trading price at the time of the repurchase. If the date on which the repurchase occurs is not a trading day, the market price is determined on the immediately preceding trading date.

The covered corporation must use the same method of determining the market price of repurchased stock that is traded on an established securities market for all repurchases that occur during the covered corporation's taxable year. If the repurchased stock is not traded on an established securities market, the market price of the repurchased stock is determined as of the repurchase date under the principles of Treas. Reg. § 1.409A-1(b)(5)(iv)(B)(1).

Section 3.08 of the Notice provides that similar rules apply for valuing stock issued by the covered corporation for purposes of applying the netting rule (discussed below), other than stock issued to an employee (for which the fair market value of the stock is determined under section 83 as of the date the stock is issued or provided to the employee).

Statutory Exceptions to the Excise Tax and Elaboration by the Notice

Under section 4501(e), repurchases that occur in one of six types of transactions are excluded from the excise tax. The excepted transactions listed in the statute are:

1. *Tax-free reorganizations*. To the extent that a repurchase is part of a reorganization (within the meaning of section 368(a)) and no gain or loss is recognized on the repurchase by the shareholder by reason of the reorganization;

2. *Employer-sponsored retirement plans*. Stock repurchased (or an amount of stock equal to the value of the stock repurchased) that is contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan;

3. *De minimis repurchases*. Stock repurchased where the total value of the stock repurchased during the taxable year does not exceed $1,000,000;

4. *Dealer transactions*. Under regulations prescribed by the Secretary, in cases in which the repurchase is by a dealer in securities in the ordinary course of business;

5. *Repurchases by RICs and REITs*. Repurchases by a section 851 regulated investment company or a real estate investment trust; and

6. *Dividend-equivalent repurchases*. Repurchases treated as a dividend under the Code.

Section 3.07 of the Notice contains details with respect to the statutory exceptions to the excise tax contained in section 4501(e) and provides that a repurchase that is described in a statutory exception under section 4501(e) is treated as a reduction in computing the covered corporation's stock repurchase excise tax base.

Reorganization Exception

The Notice expands on the statute's first exception for reorganizations under section 368(a)[22] by more specifically defining situations that are treated as transactions that do not result in gain or loss to the shareholder. The Notice does so by adding a "qualifying property exception" that reduces the stock repurchase excise tax base, interpreting the statutory exception not to have a "cliff effect," in which a transaction must be entirely tax free, but instead to have a broader "to the extent" exception, in which the exception applies to the extent the shareholders receive qualifying property (*i.e.*, property the receipt of which does not give rise to gain or loss to the shareholder under section 354 or 355[23]) in one of four types of qualifying transactions:

- a repurchase by a target corporation as part of an acquisitive reorganization;

- a repurchase by a covered corporation or a covered foreign surrogate corporation as part of an section 368(a)(1)(E) reorganization;

- a repurchase by a transferor corporation as part of an section 368(a)(1)(F) reorganization; and

- a repurchase by a distributing corporation as part of a split-off (whether or not part of a section 368(a)(1)(D) reorganization).

Thus, if section 354 or 355 applies to any of these transactions, the qualifying property exception will reduce the covered corporation's stock repurchase excise tax base. Conversely, to the extent that an exchanging shareholder receives property other than qualifying property in such a transaction, the qualifying property exception will not apply with respect to such non-qualifying property.

The approach of the Notice provides welcome relief to taxpayers who were concerned that a penny of boot in an otherwise tax-free reorganization would cause the entire transaction to be treated as a repurchase, but this portion of the Notice likely is a disappointment to those who had hoped that guidance would provide that boot received in a reorganization would be excepted from the excise tax. In this regard, a reorganization with boot, even if fully sourced or funded by the acquiring corporation, will be subject to the excise tax to the extent of the boot.[24] This is to be distinguished from taxable transactions – the Notice makes clear that the funding source of the cash (as determined under general tax principles) is determinative in fully taxable transactions.[25] Relatedly, in a fully taxable reverse subsidiary cash merger where the transitory merger subsidiary incurs debt to fund a portion of the purchase price, the debt-financed portion will be subject to the excise tax because the target corporation is treated as redeeming its own stock in exchange for the borrowed cash received by the target's shareholders in the merger.[26]

Retirement Plan Exception

The Notice provides some helpful guidance with respect to the statutory exception to the excise tax for stock contributions to employer-sponsored retirement plans.[27] Specifically, the Notice clarifies that contributions need not be for the same class of stock as was subject to the repurchase, although different valuation rules apply in determining the amount of the reduction to the excise tax base when different classes of stock are repurchased and contributed.[28] The Notice provides additional rules for determining the fair market value of stock repurchased by a covered corporation in the context of this exception, as well as a special timing rule for contributions made to a retirement plan.[29]

Dealer in Securities Exception

The Notice prescribes general rules for repurchases by a dealer in securities in the ordinary course of business.[30] Specifically, the Notice states that the exception is available for dealers in securities only if the dealer accounts for the stock as securities held primarily for sale to customers in the dealer's ordinary course of business, disposes of the stock within a time period consistent with the holding of the stock for sale to customers in the ordinary course of business, and does not sell or otherwise transfer the stock to an applicable acquiror or the covered corporation, as applicable, other than a sale or transfer to a dealer that otherwise satisfies the requirements of the exception.

Exception for Repurchases Treated as Dividends

The Notice adds a rebuttable presumption that repurchases to which section 302 or section 356(a) applies do not qualify for the statutory exception for dividends under section 4501(e)(6).[31] A covered corporation may rebut this presumption with regard to a specific shareholder by establishing with "sufficient evidence" that the shareholder treats the repurchase as a dividend on the shareholder's tax return. This evidentiary requirement is likely to present challenges for widely held public corporations

because the Notice requires that the covered corporation obtain certification from the shareholder that the repurchase constitutes a redemption treated as a section 301 distribution under section 302(d) or that the repurchase has the effect of the distribution of a dividend under section 356(a)(2), including evidence that applicable withholding occurred if required.

The Netting Rule

As mentioned above, section 4501(c)(3) provides for a taxpayer-friendly downward adjustment to the amount subject to the stock repurchase excise tax for the fair market value of any stock issued by the covered corporation during the tax year. The Notice describes this adjustment as the "netting rule" and clarifies certain valuation and timing rules.[32] The Notice also provides an exclusive list of situations that do not qualify for the rule (and therefore do not reduce the excise tax base of the covered corporation),[33] including a no-double-counting rule that eliminates netting with respect to transactions exempted from the scope of the tax under section 4501(e), discussed above.

The Notice confirms what might be considered a taxpayer favorable timing mismatch in the text of the statute.[34] Specifically, although section 4501 applies only to repurchases occurring after December 31, 2022,[35] the netting rule permits reductions with respect to a covered corporation's issuances of stock occurring at any time during the entire taxable year. The Notice specifically states that, "solely in the case of a covered corporation that has a taxable year that both begins before January 1, 2023, and ends after December 31, 2022, that covered corporation may, solely with regard to any covered repurchases during that taxable year to which the stock repurchase excise tax applies, apply the netting rule to reduce the fair market value of the covered corporation's covered repurchases during that taxable year by the fair market value of all issuances of its stock during the entirety of that taxable year."[36]

Reporting Requirements

The Notice provides that the excise tax must be reported on Form 720, *Quarterly Federal Excise Tax Return*.[37] (On December 30, 2022, the IRS issued in draft form, Form 7208, *Excise Tax on Repurchase of Corporate Stock*, that taxpayers will be required to attach to the Form 720.[38]) The IRS and Treasury expect the forthcoming proposed regulations to provide that the excise tax will be reported once per taxable year on the Form 720 that is due for the first full quarter after the close of a taxpayer's taxable year. The Notice gives, as an example, a taxpayer with a taxable year ending on December 31, 2023, which would report its stock repurchase excise tax on the Form 720 for the first quarter of 2024, due on April 30, 2024.

Comments Requested and Additional Future Coverage

Section 6 of the Notice requests comments on both specific and general issues, including the need for: special rules for redeemable preferred stock or other special classes of stock or debt; the determination of the fair market value of the stock repurchased; factors that should be considered in guidance regarding indirect ownership for purposes of whether a corporation or a partnership is a specified affiliate; whether special rules for bankrupt or troubled companies are needed; and whether additional rules should be added to prevent the avoidance of tax in the context of certain financial arrangements.

Reliance and Effective Date of Forthcoming Regulations

Until the issuance of the forthcoming proposed regulations, taxpayers may rely on the rules described in the Notice.[39]

Although regulations typically are effective when finalized, under section 7805(b)(2), final regulations issued within 18 months after the August 16, 2022, enactment of this new provision can have retroactive effect. Section 7805(b)(3) also permits certain anti-abuse regulations to have retroactive effect, but this provision presents challenges under the Administrative Procedure Act that, in our experience, make the IRS and Treasury less willing to rely on it.[40]

Additional Observations

It is likely that tax planners will revisit commonly used techniques in the M&A area, such as the market-standard reverse subsidiary cash merger. As noted above, to the extent the merger subsidiary is debt-financed, the target corporation is treated as incurring the debt and redeeming its own stock, which will cause the debt-financed portion of the acquisition proceeds to be included in the excise tax base. For this reason, there may be interest in alternative structures that avoid such redemption treatment, such as structures that place the leverage at a holding company level.

Interestingly, the Notice was one of two that the IRS and Treasury issued on December 27, both providing interim guidance with respect to recent legislation (the other, Notice 2023-7, addresses the new corporate alternative minimum tax and will be the subject of another client alert). In the past, in implementing new legislation, the IRS and Treasury have often chosen to issue proposed/temporary regulations without first issuing a notice. It is possible that the court cases challenging the validity of regulations, particularly those challenges involving the Administrative Procedure Act, have caused the government to be more cautious in promulgating regulations without providing meaningful opportunity for stakeholder input.

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[1] As was the case with Tax Cuts and Jobs Act, the Senate's reconciliation rules prevented changing the Act's name. Therefore, the Inflation Reduction Act is actually "An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14." Pub. L. No. 117–169, tit. I, § 10201(d), 136 Stat. 1831 (Aug. 16, 2022).

[2] Unless indicated otherwise or clear from context, all "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), all "Treas. Reg. §" are to the Treasury regulations promulgated under the Code, and all "§" references are to sections of Notice 2023-2.

[3] Section 4501(b).

[4] Section 4501(c)(1).

[5] Section 4501(e). These exceptions and their treatment in the Notice are discussed below.

[6] Section 4501(c)(3).

[7] Section 275(a)(6).

[8] Section 4501(f).

[9] § 3.04(2).

[10] Section 4501(e). For a discussion of these exceptions, *see* "Statutory Exceptions to the Excise Tax" below.

[11] § 3.04(3).

[12] § 3.04(3)(a).

[13] § 3.04(3)(b).

[14] § 3.04(4)(a). In the description of each transaction, the term "covered corporation" includes a "covered surrogate foreign corporation" as appropriate. The fact that the list is exclusive provides welcome certainty to taxpayers.

[15] The final regulations would benefit from an overlap rule to address transactions described in both section 368(a)(1)(B) and section 368(a)(2)(E) in which the consideration includes voting stock described in section 351(g)(2).

[16] This would occur, for example, in a situation in which a covered corporation has an 80-percent corporate shareholder and one or more minority shareholders.

[17] § 3.04(4)(b).

[18] Moreover, it appears that § 3.04(4)(b) is unnecessary in light of § 3.04(4)(a).

[19] The Notice does not contain an exception for redemptions of preferred stock, despite some requests from the SPAC industry and others for such an exception.

[20] *See*, *e.g.*, Rev. Rul. 79-401, 1979-2 C.B. 128, in which the IRS ruled that the liquidating distribution at issue was "a 'redemption' within the meaning of section 317(b) of the Code, which defines that term for purposes of section 303 [i.e., for purposes of part I of subchapter C], even though section 317(b) does not apply to section 331."

[21] Only surrogate foreign corporations that were acquired in transactions described in section 7874(a)(2)(B) after September 20, 2021 are subject to these rules. Further, presumably these rules apply only to surrogate foreign corporations subject to section 7874(a)(2)(B) and not to corporations subject to section 7874(b), which are treated as domestic corporations for purposes of chapter 37 of the Code.

[22] Section 4501(e)(1).

[23]Stock-for-stock exchanges relying solely on section 1036 generally are not section 317(b) redemptions, nor apparently are they "economically similar" transactions (because they were not included in the Notice's exclusive list).

[24] § 3.09 Ex. 19.

[25] § 3.09 Exs. 3 and 4.

[26] § 3.09 Ex. 4.

[27] Section 4501(e)(2).

[28] § 3.07(3).

[29] § 3.07(3)(d).

[30] § 3.07(4)(a).

[31] § 3.07(6).

[32] § 3.08(2)-(3).

[33] § 3.08(4).

[34] § 2.07.

[35] Pub. L. No. 117–169, tit. I, § 10201(d), 136 Stat. 1831 (Aug. 16, 2022).

[36] § 3.07(2).

[37] § 4.

[38] https://www.irs.gov/pub/irs-dft/f7208--dft.pdf.

[39] § 5.03.

[40] *See Liberty Global, Inc. v. United States*, No. 1:20-CV-03501-RBJ, 2022 WL 1001568 (D. Colo. Apr. 4, 2022), in which the court found temporary regulations issued under section 245A invalid despite the IRS's argument that section 7805 replaced the notice and comment requirement of the Administrative Procedure Act. https://www.govinfo.gov/content/pkg/USCOURTS-cod-1_20-cv-03501/pdf/USCOURTS-cod-1_20-cv-03501-0.pdf.

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