2023 Year-End Guide – Corporate and M&A

Corporations face a variety of unique tax rules and challenges – from the new alternative minimum tax and excise tax on stock repurchases to special limitations on deductions and losses, as well as complex tax rules when buying or selling a business. To minimize taxes payable, corporations should strive to identify and plan for tax issues before they arise. The following are some of the key developments and other areas to consider as corporations close tax year 2023 and begin 2024:

- Corporate Alternative Minimum Tax Guidance: Notice 2023-64
- Section 355 PLR Pilot Program Extension
- IRS Denies Request for Extension to File Success-Based Fee Safe Harbor Election
- Tax Considerations When Selling a Subsidiary
- Intercompany Balance Cleanup
- Legal Entity Rationalization
- Sections 382 and 383 Limitations on Tax Attributes – Is Your Company Prepared?
- Loss Limitations on S Corporation Shareholders
- Stock Repurchase Excise Tax: Overview and Relevant Guidance

Corporate Alternative Minimum Tax Guidance: Notice 2023-64

On September 12, 2023, the IRS issued Notice 2023-64 providing interim guidance on the corporate alternative minimum tax (CAMT). The CAMT, enacted as part of the Inflation Reduction Act of 2022, is effective for tax years beginning after December 31, 2022.

A corporation is subject to the CAMT for a taxable year if its average annual adjusted financial statement income (AFSI) exceeds $1 billion for the three-taxable-year period ending with that taxable year. Among the guidance provided, Notice 2023-64 clarifies the definition of applicable financial statement and provides the order of priority of applicable financial statements to be used in determining AFSI. The applicable financial statements with highest priority are Form 10-K, annual statement to shareholders, filed with the U.S. Securities and Exchange Commission (SEC). For non-publicly traded corporations that do not file annual financial statements with the SEC, the highest priority financial statements are the audited financial statements used for credit purposes or to report to shareholders, partners, or other proprietors, or to beneficiaries.

For purposes of calculating CAMT, certain adjustments to financial statement income are required to arrive at AFSI. Adjustments include, among others, the addback of federal income tax expense and the elimination of consolidation entries for members that are not part of the AFSI group. The Notice also clarifies the application of a two-prong AFSI test to members of foreign-parented multinational groups.

The Service intends to issue additional guidance in proposed regulations. Taxpayers subject to the CAMT should consider the interim guidance provided in Notice 2023-64 in their year-end tax planning.

Section 355 PLR Pilot Program Extension

On July 27, 2023, the IRS issued Rev. Proc. 2023-26, creating a permanent fast-track process for Private Letter Rulings (PLRs) under the jurisdiction of the Chief Counsel (Corporate).

Rev. Proc. 2017-52, issued on September 21, 2017, began an 18-month pilot program to expand the IRS ruling policy on Section 355 to again include transactional rulings. Specifically, under the fast-track process, taxpayers may request transactional rulings from the IRS on "covered transactions," which include transactions intended to qualify as tax-free under Sections 368(a)(1)(D) and 355, and distributions intended to qualify as tax-free under Sections 355(a) and (c). The expansion did not extend transactional rulings to the issues of device prohibition, business purpose, or Section 355(e). Transactional rulings may, however, include the collateral tax consequences related to covered transactions, including consequences associated with E&P, basis, and relevant consolidated return regulations.

The pilot program received extremely positive feedback from practitioners. When the initial 18-month term expired, many wondered if the program would be extended. Rev. Proc. 2023-26 makes the pilot program permanent.

Prior to the program, the PLR process was historically slow, sometimes taking a year or more to obtain a ruling. For taxpayers seeking certainty from the Service on transactions with a typical timeframe of less than a year, the fast-track process allows the parties to expect the ruling within 12 weeks. This provides taxpayers additional time to factor the Service's view on the transaction into the decision-making process. With the PLR process now more streamlined and efficient, taxpayers should consider submitting ruling requests for covered transactions where certainty is desired.

IRS Denies Request for Extension to File Success-Based Fee Safe Harbor Election

In Private Letter Ruling 202308010, the IRS concluded that a success-based fee was incurred by a parent company's selling shareholders i.e., the majority seller and PE Sponsor rather than by the target subsidiary (Taxpayer) that negotiated and was obligated to pay the fee. Consequently, the IRS denied Taxpayer's request for relief to file a late safe harbor election under Rev. Proc. 2011-29 to deduct 70% (and capitalize the remaining 30% portion) of the success-based fee.

Summary of PLR facts

The facts of the PLR are similar to many M&A transactions. Taxpayer engaged an investment banker to explore a potential transaction with the understanding that, if a transaction was carried out, the investment banker would receive a success-based fee. Pursuant to the stock purchase agreement and in keeping with established practice, the sale proceeds paid to the selling shareholders were reduced by Taxpayer's transaction costs, including the success-based fee. The agreement also required Taxpayer to make a safe harbor election.

Pursuant to the agreement, prior to closing, the buyer transferred a portion of the sale proceeds to the selling shareholders to satisfy certain liabilities, including the success-based fee. On the same day, the selling shareholders wired funds to pay the success-based fee to the investment banker. The selling shareholders accounted for the transaction as if they had received the cash attributable to the success-based fee, then contributed the cash to Taxpayer, increasing their tax basis in the parent's stock and

treating Taxpayer as paying the fee to the investment banker. Accordingly, the selling shareholders reduced their gain from the sale of the parent company's stock by the amount of the success-based fee. A timely filed safe harbor election was not made and the parent (on behalf of Taxpayer) sought Section 9100 relief.

IRS conclusion

The IRS denied the request to file a late safe harbor election, concluding that the success-based fee is a cost paid to facilitate the sale of property under Treas. Reg. §1.263(a)-1. The IRS reasoned that the success-based fee falls within Treas. Reg. §1.263(a)-1(e)(1), which applies to commissions and other transaction costs paid to facilitate a sale of property. In its finding, the IRS noted that the stock purchase agreement obligated the selling shareholders to pay the success-based fee and other transaction costs and, thus, the fee more closely resembled a cost of selling property rather than a cost incurred to facilitate an acquisition. Thus, the IRS stated that the fee must be accounted for as an offset to the sales proceeds payable to the selling shareholders.

The Taxpayer asserted that it should account for the success-based fee because it was legally obligated to pay the expense, was actively involved in the negotiation of its sale, and had primarily benefited from the investment banker's services, noting that the buyer could provide it with funding to expand its business. The IRS argued that the deductibility of the success-based fee is not determined by the party that is legally obligated to pay or that paid the cost but, rather, which party proximately benefitted from the cost. The IRS concluded that the success-based fee was directly and proximately related to the selling shareholders' activity of investing and selling portfolio companies and found that the cost only incidentally benefited Taxpayer. Thus, the IRS determined that the success-based fee should be treated as a capitalized cost of the selling shareholders and should reduce the consideration realized by the sellers from the sale.

Planning Considerations

PLR 202308010 signals that the IRS is looking closely when determining which party to an M&A transaction should account for success-based fees. The PLR appears to be inconsistent with previously issued PLRs, which have held that success-based fees may be considered by a target taxpayer pursuant to a safe harbor election.

It is yet unclear whether the IRS is re-examining its position with respect to the tax treatment of sell-side success-based fees — or if this position is limited to the specific facts of PLR 202308010. Until there is further clarity, targets should carefully review transaction agreements, document the benefit of the transaction cost to the taxpayer taking the deduction with respect to success-based fees, and timely file required safe harbor elections.

Tax Considerations When Selling a Subsidiary

The consolidated return regulations present special tax issues when a corporation is acquired out of a consolidated federal income tax group. To properly plan for these issues, taxpayers may find it beneficial

to regularly assess tax positions relating to non-core subsidiary members that may be sold for various business reasons — such as to refocus on the core business, raise capital, or streamline operations. By doing so, a company can strategically evaluate the tax implications and make informed decisions earlier in the disposition process.

Stock sale or Asset sale?

When a subsidiary corporation is sold out of a consolidated federal income tax group, it can be disposed of through either a sale of the subsidiary's stock or an actual or elective sale of the subsidiary's assets. Assessing the most suitable method of disposal is essential as it allows the seller to maintain control over the tax due diligence process as well as effectively communicate the tax benefits of the deal structure to potential buyers. When determining whether to structure a deal as a sale of stock or assets, identifying and evaluating tax attributes such as net operating losses (NOLs) and amortizable or depreciable asset basis is key, as tax attributes can play a significant role in the overall tax outcome of the transaction. It is also important to make sure the proposed tax structure aligns with the broader business objectives. By carefully considering these factors, sellers can strategically position the subsidiary for sale and enhance the overall deal value for all parties.

Stock basis

The stock basis of a subsidiary that is a member of a consolidated group is adjusted (increased or decreased) each year to reflect the subsidiary's income or loss. If a decrease in stock basis leads to negative stock basis, the subsidiary will have an "excess loss account" (ELA). When stock of a subsidiary with an ELA is disposed of by the group, the ELA must be included as additional income or gain from the disposition. Conducting a stock basis study for members of a consolidated group can avoid unidentified ELAs that could impact the economics of the transaction. Proactively identifying ELAs may afford the opportunity to structure a disposition to avoid or minimize any negative impact.

Unified Loss Rule

The unified loss rule (ULR) can reduce a subsidiary's stock loss or tax attributes where the subsidiary's stock basis and net inside tax attributes exceed its fair market value. The ULR is a complex regulation that requires a thorough analysis of stock basis and net inside tax attributes to assess its full impact. However, the ULR grants the selling consolidated group significant flexibility to modify the application of the rules, and the seller's ability (or obligation) to elect to make these modifications is typically specified in the purchase agreement.

The selling parent may elect to reattribute to itself all or any portion of the disposed subsidiary's realized but unused losses (e.g., NOLs) that are of limited value to the buyer, and a buyer may negotiate a protective election to avoid reattribution of any tax attributes they view as critical to the post-closing operations of the subsidiary (e.g., tax basis in current and long term assets). It is critical that sellers assess the strategic impact of potential ULR elections for underperforming subsidiaries to control the due diligence and tax negotiations related to their disposition.

Intercompany Balance Cleanup

Intercompany receivables and payables are commonly established between members of consolidated groups, and, if not settled regularly, these balances can grow over time. Taxpayers often seek to eliminate intercompany balances for general administrative purposes or in advance of a contemplated M&A transaction. Given that balances between members of the same affiliated group may eliminate in the consolidation process of preparing financial statements, taxpayers might otherwise ignore their existence, until they realize that eliminating the balances for tax purposes involves certain hurdles.

Prior to cancelling or otherwise simplifying intercompany balances, taxpayers should consider the following:

- If any balances would be deemed distributed and/or contributed to other group members as a result of their elimination. These deemed or actual transfers can create state tax exposure, for example, in separate-filing or "haircut" states that impose a dividend surcharge. Likewise, assets being transferred inbound or outbound may result in international tax considerations.
- If all balances are denominated in U.S. dollars. It is possible that additional currencies may cause exposure under the foreign exchange provisions of Section 988.
- If any accounts were purchased or otherwise acquired from outside parties such that there could be discount, or a mismatch between the adjusted issued price outstanding to the issuer and the basis in the instrument to the holder.

Once the impact of these issues is assessed, the simplification process typically follows a certain order:

- Receivables are first used as an asset to pay down payables, resulting in an initial "netting" of accounts that typically reduces the total number of balances requiring resolution.
- Receivables are further distributed and/or contributed among group members to locate receivable balances with the shareholder/owner of the payable holder. As stated above, this process might involve state or federal tax leakage. It is possible M&A transactions could be undertaken to minimize this exposure.
- Shareholder entities then contribute or otherwise cancel balances with directly owned entities, taking advantage of the friendlier shareholder contribution provisions under Section 108(e)(6) in which COD income is not incurred to the extent the basis of the debt contributed by a shareholder equals its outstanding balance.

Numerous issues implicating COD income and the recognition of gain, loss, or interest income or expense may arise in this process, and each taxpayer's fact pattern involves unique considerations. Taxpayers should carefully assess their situation before undertaking any transactions involving intercompany balances.

Legal Entity Rationalization

Legal entity rationalizations — the overall simplification of a taxpayer's legal structure — are commonly considered in conjunction with M&A transactions, especially those involving the acquisition of multinational groups. Multiple legal entities within a consolidated group operating in the same business line or in the same jurisdiction can lead to administrative and operational inefficiencies. Simplifying the

structure and reducing the number of legal entities from a business line perspective, jurisdictional perspective, or both can not only lead to gains in efficiency, but also to tax and tax compliance savings.

As with any structure reorganization planning, proper diligence is important to avoid unintended tax consequences and implement the legal entity rationalization in a tax efficient manner. Taxpayers should generally consider the following commonly occurring items in the process of undertaking a simplification:

- Intercompany balances may need to be resolved or otherwise simplified in order to then simplify entities.
- In certain circumstances, employees might constitute an intangible asset to the business, therefore necessitating closer consideration before simply moving their payroll from one entity to another.
- Entities that are insolvent, meaning their liabilities exceed their asset value on a stand-alone basis, may be difficult to eliminate. In addition, certain authorities make it difficult to eliminate intercompany balances (therefore making the entity solvent) prior to a liquidation.
- Certain reorganizations, especially where entities must cross a chain of entities in different jurisdictions, may involve tax leakage even in scenarios where no cash consideration is exchanged and the transactions otherwise qualify under the tax-free provisions of Section 368.
- The order or direction of mergers and acquisitions within the group may impact where certain attributes reside going forward, or if they are carried over at all. Certain state jurisdictions do not adhere to the federal attribute carryover rules under Section 381, and therefore may eliminate state attributes.
- There may be legal or business restrictions on the merger or liquidation of certain entities, or the movement of certain assets. Third-party financial obligations may not be assumed or transferred among entities. In addition, certain contracts may have covenants that prevent their transfer to other group members.

These are just some of the considerations that should be examined prior to carrying out a legal entity rationalization or simplification project. Each situation involves its own unique challenges and considerations. The critical aspect of carrying out a rationalization properly is assessing the field of issues before undertaking the transactions, therefore achieving the desired structure with the minimum amount of tax or future administrative burden.

Sections 382 and 383 Limitations on Tax Attributes – Is Your Company Prepared?

Internal Revenue Code Sections 382 and 383 govern the use of a corporation's net operating losses (NOLs), Section 163(j) business interest expense carryforwards, tax credits, and similar tax attributes following an "ownership change." A lack of attention to these code sections can result in unexpected tax liabilities and penalties — which can also affect the company's financial statements. Companies that effectively manage their Section 382 and 383 limitations can proactively plan for as well as potentially mitigate the impact of these rules on their tax attributes.

Ownership changes

For purposes of Sections 382 and 383, an ownership change occurs if there is a 50% shift in the corporation's 5% shareholder ownership within a rolling three-year period. An ownership change may occur as a result of cumulative transactions between or among a corporation and its shareholders or may come about from an acquisition or merger of the corporation.

When an ownership change occurs, the analysis required to compute the applicable limitations is complex. Careful consideration of these provisions is needed to quantify existing limitations and maximize tax planning opportunities.

Benefits of proactive monitoring

Taxpayers that proactively monitor for potential ownership changes can better manage their Section 382 and 383 limitations.

- Careful monitoring helps a company preserve its NOLs where possible, and can reveal planning opportunities that may improve the company's overall tax position, such as when to recognize income, when to incur deductible expenses, and when to engage in certain forms of capital raises.
- Examining the company's stock activity at year end, including relevant issuances, redemptions, and key shareholder movements, enables the company to assess the level of documentation required to fully support their tax positions. Furthermore, it provides the tax team with the necessary tools to better evaluate prospective capital activity in the coming years.
- There are favorable tax elections and strategies (for example, closing of the books election, share restrictions, and "poison pills") that can only be implemented if a company has a current understanding of their Section 382 shift activity and any current year Section 382 ownership changes. Failing to perform an adequate Section 382 and Section 383 analysis undermines the company's ability to utilize these and other elections and strategies effectively.
- A completed analysis creates efficiencies in the tax due diligence process. Many companies that enter a prospective transaction cannot complete a study during the diligence period, and therefore limit their ability to support the validity of their carryovers. By having a study completed, it need only be rolled forward to the prospective transaction date.

Insight

Although Sections 382 and 383 apply to all corporations, publicly traded companies generally have heightened reporting standards regarding the impact of these rules. The release of key information in SEC filings (e.g., Form 10-K and Schedules 13D and 13G) in the first couple of months following year end means that publicly traded companies often receive critical information supporting the tax provision concurrently with when auditors will be looking for supporting Section 382 analyses. Initiating the Section 382 conversation with auditors in advance of this information release is invaluable in managing the time pressure created by the SEC filing schedule.

Loss Limitations on S Corporation Shareholders

Prior to year end, owners of S corporations should consider tax planning opportunities that could help mitigate potential limitations on taxable losses passed through from S corporations.

The Internal Revenue Code limits an S corporation shareholder's taxable losses and deductions passed through from S corporations as follows:

- First, a shareholder's losses and deductions from an S corporation are generally limited under Section 1366 to the extent of their basis in the S corporation's stock and any loans they have made directly to the S corporation. Losses exceeding the shareholder's basis may be carried forward to future years, subject to the same basis limitation.
- Next, Section 465 limits losses and deductions from an S corporation to the shareholder's "at-risk" amount, which generally includes the shareholder's cash or property contributed to the S corporation, plus amounts borrowed for use by the S corporation if the shareholder is personally liable for repayment of the debt.
- Section 469 then imposes a limit on the losses and deductions based on the shareholder's involvement in the S corporation's business. A shareholder's losses from passive activities (including their passive involvement in the S corporation's business) can only offset income from other passive activities. Exceptions exist for real estate professionals and for taxpayers with active participation in certain activities. The classification of a shareholder's activities as passive or active (an activity in which they materially participate, as defined under Treas. Reg. §1.469-5T) must be determined every year.

In addition to these three hurdles, individual shareholders are subject to the rules for excess business losses (EBLs). A non-corporate taxpayer may deduct net business losses of up to $289,000 ($578,000 for joint filers) in 2023. A disallowed excess business loss (EBL) is treated as an NOL carryforward in the subsequent year, and is limited to 80% of taxable income. The Inflation Reduction Act extended the EBL rules through the end of 2028.

With proper planning, S corporation shareholders may be able to take steps before year end to help minimize loss limitations related to shareholder tax basis, at-risk amounts, or passive activities. Planning opportunities may also exist to help maximize the benefit of EBL carryforwards. However, certain planning strategies must be undertaken before the end of the taxable year.

Stock Repurchase Excise Tax: Overview and Relevant Guidance

As part of the Inflation Reduction Act of 2022, Internal Revenue Code Section 4501 was enacted on August 16, 2022, imposing an excise tax on certain repurchases of corporate stock.

On December 27, 2022, in Notice 2023-2, the Department of the Treasury and the IRS announced their intention to issue proposed regulations addressing the excise tax on repurchases of corporate stock. The Notice provides interim guidance until the regulations are published. The Notice contains (i) certain operating rules and identifies transactions that are considered repurchases of stock; (ii) rules for

reporting and paying the excise tax; (iii) rules regarding the timing and determining the fair market value (FMV) of repurchased stock; and (iv) examples applying the rules.

On June 29, 2023, the IRS issued Announcement 2023-18, confirming that no taxpayer is required to report the excise tax on any returns filed with the IRS, or to make any payments of the excise tax, before the time specified in forthcoming regulations.

Summary of IRC Section 4501

Section 4501(a) imposes a tax equal to 1% of the FMV of any stock of a "covered corporation" that is repurchased by that corporation (and certain affiliates) during the taxable year. A covered corporation includes any domestic corporation whose stock is traded on an established securities market and certain foreign corporations.

Section 4501(c)(1) states that repurchases of stock of a covered corporation include:

- Redemptions within the meaning of Section 317(b) with regard to the stock of a covered corporation; and
- Any transaction determined by the Treasury to be economically similar to a Section 317(b) redemption.

The stock repurchase excise tax applies whether or not, following the repurchase, the corporation cancels, retires, or holds the stock as treasury stock. The excise tax applies to repurchases occurring on or after January 1, 2023.

In addition, the excise tax applies to acquisitions of the covered corporation's stock by specified affiliates of the corporation. Specified affiliates include:

- A corporation that is more than 50% owned (by vote or value), directly or indirectly, by the covered corporation; and
- A partnership in which the covered corporation holds, directly or indirectly, more than 50% of the capital or profits interests.

Further, the excise tax applies to the acquisition of stock of certain foreign corporations that are traded on an established securities market when a specified affiliate of the foreign corporation (generally a domestic subsidiary) acquires the stock from a person other than the foreign corporation or another specified affiliate.

In computing the stock repurchase excise tax, the value of stock repurchased is reduced by the FMV of any repurchases that fall within one of following six statutory exceptions:

1. Repurchases to the extent part of a tax free reorganization where no gain or loss is recognized;
2. Repurchases where the repurchased stock (or stock of equal value) is contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan;
3. Repurchases in which the total value of repurchased stock during the taxable year does not exceed $1 million;
4. Repurchases by a dealer in securities in the ordinary course of business;

5. Repurchases by a RIC or a REIT; and
6. Repurchases treated as a dividend.

Under the netting rule, the excise tax base also is reduced by the FMV of any issuances of the covered corporation's stock during its taxable year. Payments of excise tax made under Section 4501 are not deductible for federal tax purposes.

Notice 2023-2: Key Provisions

Definitions: "Redemptions," "Economically Similar Transactions," and "Not Economically Similar Transactions"

Notice 2023-2 identifies transactions that constitute a repurchase for purposes of computing the excise tax.

In general, Section 4501 imposes the 1% excise tax on any Section 317(b) redemption. However, the Notice provides an exclusive list of transactions treated as Section 317(b) redemptions that are not treated as repurchases and, therefore, are not subject to the excise tax. These transactions include certain Section 304 transactions (redemption through the use of a related corporation) and certain payments of cash in lieu of fractional shares.

The Notice also provides an exclusive list of repurchases that technically may not qualify as Section 317(b) redemptions but are deemed to be economically similar transactions. These transactions include:

- Acquisitive reorganizations that may include boot (i.e., types "A," "C," and "D" reorganizations);
- Certain single-entity reorganizations, including recapitalizations ("E" reorganizations) and mere changes in identity, form or place of incorporation ("F" reorganizations);
- Split-offs (involving a redemption of distributing stock, as opposed to spin-offs or split-ups, which are not considered repurchase transactions); and
- Complete liquidations with respect to which both Section 331 and Section 332 apply (i.e., in such a liquidation scenario, only the Section 331 portion of the liquidation is treated as a redemption for Section 4501 excise tax purposes).

If a transaction is neither a Section 317(b) redemption nor economically similar to a Section 317(b) redemption, the transaction will not be subject to the excise tax. The Notice provides a nonexclusive list of transactions that are deemed not to be economically similar to a Section 317(b) redemption, which include complete liquidations covered solely by Section 331 or by Section 332(a), and divisive Section 355 transactions other than split offs.

U.S. subsidiaries of foreign publicly traded corporations

The Notice provides that an applicable foreign corporation's acquisition of its own shares can be subject to the excise tax if a specified affiliate funds by any means (including through distributions, debt, or capital contributions) the repurchase of the foreign corporation's stock and the funding is undertaken for a principal purpose of avoiding the excise tax. A principal purpose is deemed to exist if the repurchase occurs within two years of the funding (other than a funding through a distribution).

Determining the FMV of Repurchased Stock

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 clarifies that the FMV of repurchased stock is its market price (irrespective of whether the market price is the price at which the stock was repurchased). The Notice identifies four methods for determining the market price of repurchased stock that is traded on an established securities market, including:

- The daily volume-weighted average price as determined on the date the stock is repurchased;
- The closing price on the date the stock is repurchased;
- The average of the high and low prices on the date the stock is repurchased; and
- The trading price at the time the stock is repurchased.

If the date on which the repurchase occurs is not a trading day, the market price is determined on the immediately preceding trading date. If the stock is not traded on an established securities market, rules under Section 409A are to be used to determine the market price of the stock. The Notice requires that a covered corporation must consistently use one of the above methodologies for purposes of determining the FMV of all repurchased and issued shares during the tax year.

Tax Reporting / Compliance Mechanics

The IRS plans to update its Form 720, *Quarterly Federal Excise Tax Return,* to include the Section 4501 excise tax and has issued (in draft form) an additional form, Form 7208, that covered corporations are to attach to Form 720 specifically to report the excise tax. Form 720 is to be filed annually, with the reporting date on the last day of the first month after the end of the first quarter of the year following the tax year being reported. For example, a covered corporation will report its excise tax on stock repurchases for the 2023 tax year on April 30, 2024. Extensions to report and pay the excise tax will not be permitted.

Announcement 2023-18

Announcement 2023-18 provides that for taxpayers with a tax year ending after December 31, 2022, but prior to the issuance of the forthcoming regulations (i.e., for fiscal year filers and taxpayers with a short tax year ending prior to December 2023), such regulations are expected to provide that any liability for the excise tax for such tax year will be reported on the Form 720 that is due for the first full quarter after the date of publication of the forthcoming regulations, and that the deadline for payment of the stock repurchase excise tax is the same as the filing deadline. In addition, the Announcement makes clear that there will be no addition to tax under Section 6651(a) (or any other provision of the Code) for failure to file a return report or pay the excise tax before the time specified in the forthcoming regulations.

Planning Considerations

To calculate the excise tax base amount, a covered corporation must identify the fair market value of all repurchases (i.e., all redemptions subject to the excise tax and economically similar transactions, reduced by excluded repurchases) of the covered corporation's stock in 2023, and the fair market value of certain stock issuances. Taxpayers should begin aggregating information to compute the excise tax.

Taxpayers also may want to consider whether to accelerate any future stock issuances into 2023 to reduce their 2023 excise tax base amount.

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