Four Takeaways From Treasury's Corporate Stock Buyback Guidance

By Timothy Nichols

Timothy Nichols of KPMG LLP in Washington, D.C., breaks down the highlights of US Treasury guidance on corporate stock buybacks and advises taxpayers on next steps

On Dec. 27, the Treasury Department released an advance version of Notice 2023-2 providing interim guidance on the new non-deductible 1% excise tax on repurchases of corporate stock under Section 4501, which took effect on Jan. 1. The following are some of the major points addressed by the notice.

Payment Procedures

The notice states that Treasury anticipates that the excise tax will be reported on Form 720 (Quarterly Federal Excise Tax Return). It also states that a new form will be promulgated to facilitate computation of the tax, which taxpayers will be required to attach to the Form 720.

Consistent with this, the IRS released an early draft of Form 7208 (Excise Tax on Repurchase of Corporate Stock) the day after the notice was issued. Although Form 720 is filed quarterly, Treasury expects 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 the taxpayer's taxable year. Treasury expects the forthcoming proposed regulations to provide that the deadline for payment of the excise tax is the same as the filing deadline, and that no extensions will be permitted for reporting or paying the excise tax.

However, there is no statement in the notice that taxpayers can rely on the timing of payment rules until further guidance is issued, so additional guidance regarding the timing of payments ideally will be released soon.

Definition of Repurchase

The notice provides guidance on which transactions constitute repurchases for purposes of the excise tax. Perhaps most notably, it doesn't include a general exception for repurchases of preferred stock. Therefore, absent further guidance, the retirement of preferred stock of a covered corporation would be subject to the excise tax in full in many cases. (In general, a covered corporation is a US corporation with at least one class of stock traded on an established securities market, though certain foreign corporations are also covered corporations.) This would be true whether or not the preferred stock is itself publicly traded.

There also is an exception for certain liquidating distributions and clarification of the application of the excise tax in certain reorganizations of publicly held target corporations.

Definition of Issuance

For purposes of the netting rule, which generally allows a covered corporation to offset, within a taxable year, stock issuances against stock repurchases in calculating its excise tax liability, the notice clarifies that certain issuances (such as those of parent stock to certain subsidiaries and distributions of stock with respect to stock) don't count as issuances.

General Procedures

The notice clarifies certain timing and calculation issues, including the provision of four permissible methods of calculating the value of publicly traded stock repurchased, subject to a consistency requirement to use the same method for all repurchases within a taxable year. It includes rules addressing the timing of repurchases and issuances (including to employees) for purposes of the excise tax. It also includes rules providing the potential ability to treat certain contributions to an employer-sponsored retirement plan in the first four months following the end of a tax year as occurring in that prior tax year and reducing the excise tax liability that would otherwise exist.

Conclusion

While the excise tax is only a non-deductible 1% tax, given the prevalence of repurchase transactions, it is still projected to be a significant revenue raiser for the government. Overall, the notice represents helpful and timely guidance regarding the operation of the excise tax.

Practitioners can now advise clients on when the excise tax is expected to be due and how the value of shares issued and repurchased is calculated in most cases. Further, the notice provides guidance on the expected application of the excise tax to many M&A transactions, providing better clarity as to the extent to which the excise tax will represent an additional cost of those transactions.

Finally, Section 6 of the notice lists numerous issues on which Treasury has requested comments. The notice won't be the last piece of guidance addressing the excise tax. Affected taxpayers may want to review the items on which comments are requested, as well as the potential application of the excise tax to them more generally, to see whether it makes sense to comment on any issues.

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