



December 21, 2022

The Honorable Lily L. Batchelder
Assistant Secretary (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

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Re: New Excise Tax on Repurchase of Corporate Stock – Implementation Issues and Priority Guidance Recommendations

Dear Assistant Secretary Batchelder and Mr. Paul:

On behalf of the U.S. Chamber of Commerce (“Chamber”), I am pleased to provide the enclosed comments concerning the new 1% excise tax on corporate stock repurchases enacted in Public Law 117-169, colloquially known as the Inflation Reduction Act of 2022 (“IRA”).¹ As the world’s largest business federation, the Chamber represents the interests of millions of businesses of every size, industry sector, and region, and is dedicated to promoting and defending America’s free enterprise system. As such, the Chamber is well positioned to provide consensus-based input on significant issues of federal tax policy and administration from a cross-industry perspective.

The enclosed comments identify a range of threshold implementation issues arising under the new law and provide constructive recommendations for addressing them in regulations or other guidance. Our objective in providing these comments is to help you and your colleagues prioritize those implementation issues of greatest mutual concern to American companies—and for which regulatory or other guidance is most urgently needed—as they prepare to apply and comply with the IRA. The enclosed comments are the product of extensive consultations with a wide array of affected Chamber members.

The Chamber appreciates the opportunity to share our initial implementation concerns and priority guidance recommendations with respect to the new excise tax. We strongly urge the Department of the Treasury and Internal Revenue Service to work closely with the business community throughout the IRA implementation process to address these and other issues that are critical to the efficient functioning of U.S. capital markets. To that end, I would welcome the opportunity to discuss our comments with you or your colleagues in further detail and provide

¹ An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14, Pub. L. No. 117-169, § 10201, 136 Stat. 1818, 1828–31 (2022) (to be codified at I.R.C. § 4501).

whatever additional information or support you may require. Thank you for your time and attention.

Sincerely,



Watson M. McLeish
Senior Vice President, Tax Policy
U.S. Chamber of Commerce

Enclosure

Copies: The Honorable Ronald L. Wyden, Chairman, U.S. Senate Committee on Finance
The Honorable Michael D. Crapo, Ranking Member, U.S. Senate Committee on Finance
The Honorable Richard E. Neal, Chairman, U.S. House Committee on Ways and Means
The Honorable Kevin P. Brady, Ranking Member, U.S. House Committee on Ways and Means
Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, United States Congress
Robert H. Wellen, Associate Chief Counsel (Corporate), Internal Revenue Service

**PUBLIC LAW 117-169, THE INFLATION REDUCTION ACT OF 2022
IMPLEMENTATION ISSUES AND PRIORITY GUIDANCE RECOMMENDATIONS**

PROVISION	ISSUE(S)	DISCUSSION
SEC. 10201. EXCISE TAX ON REPURCHASE OF CORPORATE STOCK		
Sec. 10201(a), IN GENERAL		
<p>I.R.C. § 4501(a), GENERAL RULE (a) GENERAL RULE.—There is hereby imposed on each covered corporation a tax equal to 1 percent of the fair market value of any stock of the corporation which is repurchased by such corporation during the taxable year.</p>	<p>Fair Market Value – Meaning (Measure of Value) Section 4501 does not define “fair market value” for purposes of determining the (unadjusted) base on which the excise tax is imposed.¹</p> <ul style="list-style-type: none"> • For repurchases of publicly traded stock, the meaning might seem obvious (i.e., the price paid to repurchase the stock, including any associated fees) but it is not necessarily so simple. Publicly traded stock can have multiple reported prices on any given trading day, including an opening price, closing price, prior trading day closing price, and arithmetic mean of the high and low prices from the prior trading day.² • In other cases (e.g., repurchases of closely held stock), the fair market value of a covered corporation’s stock may not be as readily determinable. 	<p>Recommendation – Valuing Publicly Traded Stock The Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) should issue regulations or other published guidance providing that, in general, the fair market value of publicly traded stock for this purpose is the actual price that the covered corporation paid to repurchase the stock, inclusive of any associated fees. Additionally, such regulations or other guidance should provide taxpayers the option—but not the requirement—to use one of the “Safe Harbor Valuation Methods” described in Revenue Procedure 2018-12 to determine the fair market value of publicly traded stock in appropriate circumstances (e.g., repurchases pursuant to preexisting option contracts, certain accelerated share repurchase transactions):</p> <ol style="list-style-type: none"> (1) Average of the Daily Volume Weighted Average Prices; (2) Average of the Average High-Low Daily Prices; or (3) Average of the Daily Closing Prices.³ <p>Recommendation – Valuing Closely Held Stock Treasury and the IRS should issue regulations or other published guidance clarifying that general valuation principles for valuing closely held securities—the asset-based approach, the market approach, and the income approach—should apply for purposes of section 4501.⁴</p>

¹ Unless otherwise indicated, all references to “section” herein are to sections of the Internal Revenue Code of 1986, as amended (“Code” or “I.R.C.”)

² See, e.g., Chandra Wallace, *Simple Language of Buyback Tax Translates to Complex Unknowns*, 176 Tax Notes Fed. 1541, 1542 (Sept. 5, 2022).

³ Rev. Proc. 2018-12, § 4.01, 2018-6 I.R.B. 349, 350.

⁴ See, e.g., IRM 4.48.4.2.3(2) (Sept. 22, 2020).

	<p>Fair Market Value – Timing (Measurement Date/Period) When or over what period should fair market value of the repurchased stock be measured?</p> <ul style="list-style-type: none"> It is not uncommon for repurchases of corporate stock to require two business days to complete—the execution date (the day that the covered corporation instructs its bank/broker to repurchase the stock) and the closing or settlement date (the day that the repurchase transaction closes). 	<p>Recommendation – Valuation Date For cases involving the use of a valuation method other than the actual price paid to repurchase the stock, including any associated fees, Treasury and the IRS should issue regulations or other published guidance clarifying the appropriate valuation date for purposes of determining the fair market value of the stock (e.g., the execution date, the closing/settlement date).</p> <p>Recommendation – Alternative Valuation Approach Assuming that the fair market value of stock is measured separately for each repurchase under subsection (a), taxpayers will need to implement sophisticated tracking systems and processes to apply the netting adjustment provided in subsection (c)(3). As a result, Treasury and the IRS should consider issuing regulations or other published guidance providing for an <i>elective</i> alternative valuation approach that would allow covered corporations to use an annual valuation convention to determine a single, uniform fair market value for all relevant repurchases and issuances made during the taxable year for purposes of section 4501.</p>
<p>I.R.C. § 4501(c)(1), REPURCHASE.—IN GENERAL (1) IN GENERAL.—The term ‘repurchase’ means— (A) a redemption within the meaning of section 317(b) with regard to the stock of a covered corporation, and (B) any transaction determined by the Secretary to be economically similar to a transaction described in subparagraph (A).</p>	<p>Economically Similar Transactions Under subparagraph (A), a “repurchase” generally occurs when the covered corporation reacquires its stock from a shareholder in exchange for property, whether or not the stock so reacquired is cancelled, retired, or held as treasury stock.⁵ But what is contemplated by subparagraph (B)? What objective criteria or factors will Treasury and the IRS consider in making the “economically similar” determination, and in what context or circumstances will such determinations be made?</p>	<p>Observation Because a “repurchase” for purposes of section 4501 is defined by reference to a redemption, it appears that the new excise tax is intended to charge a toll on non-dividend distributions that reduce the covered corporation’s equity from a balance sheet perspective.⁶ Thus, logic dictates that an “economically similar” transaction would be one where a covered corporation neither actually nor hypothetically reacquires its stock if the economic result of the transaction is the tax-free extraction of corporate equity.</p>

⁵ See I.R.C. § 317(b).

⁶ See, e.g., Cathryn R. Benedict & Philip B. Wright, *Excise Tax on Share Repurchases: A Provision Searching for Its Purpose*, 63 Tax Mgmt. Mem. (BNA) 241 (2022).

<p>I.R.C. § 4501(c)(3), REPURCHASE.— ADJUSTMENT</p> <p>(3) ADJUSTMENT.—The amount taken into account under subsection (a) with respect to any stock repurchased by a covered corporation shall be reduced by the fair market value of any stock issued by the covered corporation during the taxable year, including the fair market value of any stock issued or provided to employees of such covered corporation or employees of a specified affiliate of such covered corporation during the taxable year, whether or not such stock is issued or provided in response to the exercise of an option to purchase such stock.</p>	<p>Fair Market Value – Meaning (Measure of Value)</p> <p>Subsection (c)(3) provides a “netting” rule that generally limits the base of the new excise tax to the amount by which the fair market value of stock repurchased by a covered corporation exceeds the fair market value of stock issued by the covered corporation during the taxable year. Here again, however, the statute stops short of defining the “fair market value” of stock issued by the covered corporation for purposes of the netting rule (i.e., for determining the <i>adjusted</i> base on which the excise tax is imposed).</p> <ul style="list-style-type: none"> • For instance, the fair market value of stock issued to the public could be the offering price paid by the purchaser of the stock in a public offering or the net proceeds received by the covered corporation—the difference being the costs of issuance, which can be significant. • And stock issued or provided to employees as part of an equity-based compensation arrangement is often redeemed at prices different from the public trading price, and privately negotiated sales might involve prices discounted or otherwise adjusted for a variety of reasons. 	<p>Recommendation – Valuing Publicly Traded Stock Issued to the Public</p> <p>Treasury and the IRS should issue regulations or other published guidance providing that the fair market value of publicly traded stock issued to the public for this purpose is the offering price that the purchaser paid to purchase the stock in a public offering.</p> <p>Recommendation – Valuing Publicly Traded Stock Issued or Provided to Employees</p> <p>Treasury and the IRS should issue regulations or other published guidance providing taxpayers the option—but not the requirement—to use one of the “Safe Harbor Valuation Methods” described in Revenue Procedure 2018-12 to determine the fair market value of publicly traded stock issued or provided to employees:</p> <ol style="list-style-type: none"> (1) Average of the Daily Volume Weighted Average Prices; (2) Average of the Average High-Low Daily Prices; or (3) Average of the Daily Closing Prices.⁷ <p>Recommendation – Valuing Closely Held Stock</p> <p>Here again, Treasury and the IRS should issue regulations or other published guidance clarifying that general valuation principles for valuing closely held securities—the asset-based approach, the market approach, and the income approach—should apply for purposes of section 4501.⁸</p>
	<p>Fair Market Value – Timing (Measurement Date/Period)</p> <p>Fluctuations in fair market value between the time stock is repurchased and the time offsetting stock is issued or provided to employees could materially affect a covered corporation’s excise tax liability under the netting rule, particularly with respect to stock that is thinly traded or has a volatile price.</p>	<p>Recommendation – Alternative Valuation Approach</p> <p>Treasury and the IRS should consider issuing regulations or other published guidance providing for an <i>elective</i> alternative valuation approach that would allow covered corporations to use an annual valuation convention to determine a single, uniform fair market value for all relevant repurchases and issuances made during the taxable year for purposes of section 4501.</p>

⁷ Rev. Proc. 2018-12, § 4.01, 2018-6 I.R.B. 349, 350.

⁸ See, e.g., IRM 4.48.4.2.3(2) (Sept. 22, 2020).

	<p>Treatment of Sell-to-Cover Arrangements It is not uncommon for the exercise of an employee stock option to involve a “sell to cover” arrangement, which is a form of cashless exercise whereby an employee exercises his or her option and authorizes the covered corporation to sell the appropriate amount of stock awarded upon exercise to cover the exercise price and applicable withholding taxes. The employee receives the net or remaining amount of the stock awarded.</p>	<p>Recommendation Treasury and the IRS should issue regulations or other guidance providing that, in general, the fair market value of any stock “issued or provided” to employees during the taxable year in response to the exercise of an option to purchase such stock includes the sum of:</p> <ul style="list-style-type: none"> (1) the fair market value of the stock received by the employee; and (2) the fair market value of any stock sold by the covered corporation to cover the exercise price and applicable withholding taxes under a sell-to-cover or similar arrangement.
<p>I.R.C. § 4501(e), EXCEPTIONS (e) EXCEPTIONS.—Subsection (a) shall not apply— (1) to the extent that the repurchase is part of a reorganization (within the meaning of section 368(a)) and no gain or loss is recognized on such repurchase by the shareholder under chapter 1 by reason of such reorganization</p>	<p>Receipt of Additional Consideration (Boot) Under the first of the six exceptions provided in subsection (e), the new excise tax will not apply “to the extent that the repurchase is part of a reorganization . . . and no gain or loss is recognized on such repurchase by the shareholder.” This language raises fundamental questions of application and operation:</p> <ul style="list-style-type: none"> • Will the receipt of other property or money (“boot”) by any shareholder make the exception inapplicable to the transaction as a whole or only with respect to such shareholder?⁹ • In the latter case, where the excise tax would apply only to repurchases of covered corporation stock from shareholders that receive at least some boot in exchange for their stock, on what base will the excise tax be imposed? 	<p>Recommendation It is implausible that Congress would have intended to tax 100% of the fair market value of the stock repurchased as part of every reorganization with any boot. And given the impracticability of determining gain or loss recognition at the shareholder level, with respect to each individual shareholder’s basis in the stock repurchased, Congress likely intended to tax the fair market value of the stock repurchased but only to the extent of the fair market value of the boot received. Accordingly, Treasury and the IRS should issue regulations or other published guidance clarifying that the excise tax in subsection (a) will apply to a repurchase that is part of a reorganization with boot, but only to the extent of the fair market value of the boot.</p>

⁹ If nonrecognition treatment would apply to an exchange but for the fact that the consideration received by a target shareholder includes other property or money, then the gain, if any, to the recipient shareholder is recognized to the extent of the sum of such money and the fair market value of such other property. I.R.C. § 356(a).

Section 355 Split-Off Transactions

In a section 355 “split-off” transaction, the parent corporation exchanges its stock in a controlled subsidiary for a portion of the parent corporation’s outstanding stock. This exchange is presumably a redemption under section 317(b) and, therefore, potentially subject to the new excise tax. And while a section 355 transaction would ordinarily be part of a reorganization within the meaning of section 368(a)(1)(D), and thus eligible for this exception, section 355 can apply to a transaction outside of a reorganization.

Recommendation

If the purpose of section 4501 is to impose a toll charge on a non-dividend reduction in the equity of the covered corporation, then a distribution satisfying the requirements of section 355 should not be subject thereto—whether or not it is part of a reorganization within the meaning of section 368(a); although the equity of the covered corporation is reduced in the exchange, such equity remains in corporate solution and potentially subject to the excise tax with respect to any stock repurchase by the controlled corporation.¹⁰ A split-off, in other words, is merely a division that realigns continuing interests in property under modified corporate forms.¹¹ Treasury and the IRS, therefore, should issue regulations or other published guidance clarifying that a distribution satisfying the requirements of section 355 is not subject to the new excise tax—whether or not the distribution is part of a reorganization within the meaning of section 368(a).

¹⁰ See, e.g., Benedict & Wright, *supra* note 6.

¹¹ See Treas. Reg. § 1.355-2(b)(1).

<p>I.R.C. § 4501(e), EXCEPTIONS (e) EXCEPTIONS.—Subsection (a) shall not apply— * * *</p> <p>(2) in any case in which the stock repurchased is, or an amount of stock equal to the value of the stock repurchased is, contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan</p>	<p>Valuation and Timing Issues</p> <p>A contribution of stock to an employer-sponsored retirement plan, employee stock ownership plan (“ESOP”), or similar plan may not—and often does not—occur on the same date as the repurchase. For such a contribution, would the value be based on a particular trading price on a particular date (or time of day), an average trading price on a particular date, or another metric? Here again, fluctuations in the stock’s value between the time of repurchase and the time of contribution have the potential to materially affect a covered corporation’s excise tax liability, particularly with respect to stock that is thinly traded or that has a volatile price.</p> <p>Furthermore, subsection (e)(2) does not specify any period of time within which the repurchased stock, or an amount of stock equal to the value of the repurchased stock, must be contributed to an employer-sponsored retirement plan, ESOP, or similar plan for this exception to apply.</p>	<p>Recommendation</p> <p>Treasury and the IRS should issue regulations or other published guidance providing taxpayers the election to determine the fair market value of any stock contributed to an employer-sponsored retirement plan, ESOP, or similar plan as of the date of the contribution using the same general valuation standards for measuring the fair market value of stock repurchased or issued by the covered corporation. The fair market value of the contributed stock could then offset the fair market value of stock repurchased by the covered corporation during the taxable year in the same manner as under the netting rule in subsection (c)(3). The availability of such an election would allow taxpayers to avoid the burden of implementing sophisticated tracing systems and processes to match the shares of repurchased stock with the shares of contributed stock.</p>
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<p>I.R.C. § 4501(f), REGULATIONS AND GUIDANCE</p> <p>(f) REGULATIONS AND GUIDANCE.—The Secretary shall prescribe such regulations and other guidance as are necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of this section, including regulations and other guidance—</p> <p style="text-align: center;">* * *</p> <p>(2) to address special classes of stock and preferred stock</p>	<p>Redemptions of Plain Vanilla Preferred Stock</p> <p>Corporate stock with the following four characteristics is generally considered “plain vanilla preferred stock” for federal income tax purposes: (1) nonvoting; (2) limited and preferred as to dividends and without participation in corporate growth to any significant extent; (3) limited redemption and liquidation premium rights; and (4) nonconvertible.¹² Given these characteristics, redemptions of plain vanilla preferred stock are qualitatively akin to repaying a class of debt; they do not resemble the type of opportunistic stock repurchases that Congress sought to curtail with the new excise tax.¹³</p> <p>When Congress enacted the excise tax in section 4501, lawmakers recognized that preferred stock may warrant special treatment and directed Treasury to prescribe regulations or other guidance “to address special classes of stock and preferred stock.”</p>	<p>Recommendation</p> <p>Treasury and the IRS should fulfill their statutory directive by issuing regulations or other published guidance exempting the repurchase of plain vanilla preferred stock from the scope of new excise tax in section 4501.</p>
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¹² See generally I.R.C. §§ 382(k)(6)(A), 1504(a)(4). By contrast, quintessentially common stock provides for an equal pro rata share of the profits and assets of the corporation with no preference or advantage over other stock.

¹³ See, e.g., 167 Cong. Rec. S6451 (daily ed. Sept. 13, 2021) (statement of Sen. Sherrod Brown introducing S. 2758, the Stock Buyback Accountability Act of 2021, which was the predecessor to section 4501, and raising the perception that companies implement stock repurchase programs to opportunistically drive up their stock price, enrich wealthy shareholders and corporate insiders, and increase the value of executives’ compensation packages).

Compliance and Reporting Issues

Section 4501 addresses neither the timing for payment of nor the reporting requirements for the new excise tax. Instead, Congress provided a general directive to Treasury (and, by extension, the IRS) to “prescribe such regulations and other guidance as are necessary or appropriate to carry out . . . the purposes of this section.”¹⁴

Recommendations

Given the structure of the new excise tax in section 4501 and its netting adjustment in subsection (c)(3), which applies on a taxable-year basis, taxpayers should be permitted to determine, report, and pay their excise tax liabilities on an *annual* basis. Accordingly, we recommend that Treasury and the IRS fulfill their statutory directive by issuing regulations or other published guidance providing that:

- a covered corporation’s section 4501 excise tax return is required to be filed on or after the due date for the corporation’s Form 1120, *U.S. Corporation Income Tax Return*, and that the former return cover the same period (taxable year) as the latter; and
- payment of the covered corporation’s section 4501 excise tax liability (if any) is due on or after the filing deadline for the corporation’s excise tax return, and that no estimated tax payments, deposits, or withholding is required with respect thereto.

¹⁴ I.R.C. § 4501(f).