ADVANCING FORWARD: DELAWARE COURTS PROVIDE FURTHER GUIDANCE ON INCUMBENT BOARD ENFORCEMENT OF ADVANCE NOTICE BYLAWS

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In late 2021 and early 2022, two decisions from the Court of Chancery addressing advance notice bylaws reiterated, consistent with long-standing Delaware law, that clear and unambiguous advance notice bylaws will be enforced. These decisions also noted that application of such bylaws remains subject to equitable review to determine if the incumbent board acted manipulatively or otherwise inequitably in rejecting stockholder board nominees.[1] However, these decisions also articulated slightly different standards of review—with the court in the first decision holding that under the court's equitable review a stockholder could prove "compelling circumstances" justifying a finding of inequitable conduct, while the court in the second decision expressly applied enhanced scrutiny, placing the burden on the incumbent board to demonstrate it acted reasonably.[2]

The Court of Chancery's most recent decision on this topic further reiterates that clear and unambiguous bylaws will be enforced. Furthermore, the decision clarifies that enhanced scrutiny focusing on the reasonableness of incumbent board conduct is the standard of review that applies to the application of even validly enacted advance notice bylaws. Therefore, when assessing a board's application of an advance notice bylaw, the court will analyze whether the board has identified proper corporate objectives and has justified its actions as reasonable in relation to those objectives.

AIM ImmunoTech

In *Jorgl v. AIM ImmunoTech Inc.*,[3] the Court of Chancery rejected a request for preliminary, mandatory injunctive relief on behalf of a dissident stockholder and his proposed slate of board nominees by denying the plaintiff's motion for preliminary injunction in favor of the defendants, AIM ImmunoTech Inc. and the incumbent board.

The court's decision laid out the interesting factual circumstances of the plaintiff's director nominations, which occurred within the larger context of an ongoing attempt by a group, comprised of both stockholders and non-stockholders, to take over the company. As one part of this takeover attempt, the plaintiff, who had only acquired stock 10 days before his director nominations were submitted, put forth two non-stockholders for positions on the company's three-member board. The incumbent board was immediately suspicious, as one of the nominees was the same individual recently submitted as a director nominee by another stockholder. The board had rejected those nominations and suspected that a stockholder named Franz Tudor, who had allegedly been harassing the company for years, was secretly behind them. The short period and common nominee between the prior failed nominations and the plaintiff's current nominations prompted the board to investigate further. It discovered information leading it to conclude that Tudor and his allies were also behind the plaintiff's effort. Based on this undisclosed information, the board unanimously rejected the nomination notice, leading to litigation.

The court first analyzed the board's decision to reject the nomination notice by considering whether it complied with the company's advance notice bylaw. The court noted that Section 1.4(c) of the bylaws required disclosure by the nominating stockholder of "a description of all arrangements or understandings between such stockholder and each proposed nominee and any other person or persons (including their names) pursuant to which the nomination(s) are to be made."[4] The court reiterated that "[c]lear and unambiguous advance

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notice bylaw conditions act[] in some respects as conditions precedent to companies being contractually obligated to take certain actions."[5]

The court concluded that the plain meaning of "arrangements or understandings," as demonstrated by reference to dictionary definitions, required the stockholder "to disclose any advance plan, measure taken, or agreement—whether explicit, implicit, or tacit—with any person towards the shared goal of the nomination."[6] The court rejected the plaintiff's argument that "arrangements or understandings" required a *quid pro quo*.

Next, the court considered whether the nomination notice satisfied the unambiguous requirements of the bylaw. The court analyzed the record evidence that, behind the scenes of the plaintiff's nomination, both stockholders and non-stockholders, led by Tudor, were working together to devise legal strategy and to formulate a plan for a proxy contest in order to ultimately take control of the board. The court rejected the plaintiff's argument that the information in the notice was truthful and to the best of his knowledge at the time. Clearly doubting the veracity of the plaintiff's statements about his own knowledge, the court held that the disclosure about "arrangements or understandings" was at least misleading. The court also highlighted that, even if the plaintiff's knowledge of the extent of the roles of others in the nominations was limited, one of the proposed board nominees clearly knew the full information and was involved in preparation of the nomination notice, yet stayed silent. For all these reasons, the court held that the plaintiff failed to show that the nomination notice undisputedly met the bylaw's requirements.

The court then moved on to an equitable review of the incumbent directors' decision to reject the nomination notice, because "the Board's technical entitlement to reject the Notice does not necessarily mean that equity will allow it to stand."[7] The court noted that the parties agreed that some form of enhanced scrutiny was appropriate, but disagreed on the standard's label and requirements. The plaintiff argued that the defendants were required to show a "compelling justification" for their actions as set forth in *Blasius Industries, Inc. v. Atlas Corp*.[8] The defendants, on the other hand, argued that—"whether labeled as *Unocal*[9] or *Blasius*"—enhanced scrutiny review that looks to the reasonableness of the board's actions should be applied. Concluding that the "exacting review" of *Blasius* was not appropriate, the court noted that "[s]till, this court must 'reserve space for equity to address the inequitable application of even validly-enacted advance notice bylaws.' "[10] The court stated that "enhanced scrutiny requires a context-specific application of the directors' duties of loyalty, good faith, and care" and that to satisfy the standard "[t]he board must 'identify the proper corporate objectives served by their actions and justify their actions as reasonable in relation to those objectives.' "[11]

In applying enhanced scrutiny review, the court first addressed whether the corporate objectives served by the advance notice bylaw were reasonable. The court began by noting that "[a]dvance notice bylaws are 'commonplace' tools for public companies to ensure 'orderly meetings and election contests."[12] Notably, the plaintiff did not question the board's intentions in adopting the advance notice bylaw and it had been adopted on a "clear day.' " Instead, the plaintiff challenged the provision's potential breadth, arguing that if "arrangements and understandings" is not limited to circumstances where there is an exchange of promises, the standard is unworkable. The court rejected this position after concluding that the plain language of the company's bylaw was not so sweeping, that it was not unreasonable, that there were legitimate reasons why the board would want to know whether a nomination was part of a broader scheme to control the company and that the information would be important to stockholders in deciding which director candidates to support.

Finally, the court considered whether the board's rejection of the nomination notice was a reasonable re-

sponse in relation to these corporate purposes. The defendants argued that they acted reasonably after the board surmised that the nomination notice was part of a broader scheme involving undisclosed arrangements and understandings. The plaintiff, for his part, contended that the board sought merely to entrench itself at the expense of his rights as a stockholder to nominate directors. The court sided with the defendants after considering issues undermining the plaintiff's position, such as the context in which the board received and considered the plaintiff's notice, as well as the legitimate grounds the board had to question the plaintiff's motives, including his having bought stock only 10 days before nominating two non-stockholders, one of whom was a nominee on a previously rejected nomination notice. Ultimately the court concluded that these factors, in addition to lingering factual disputes, prevented granting the plaintiff's motion as a matter of law.

Takeaways

- This most recent decision by the Court of Chancery involving advance notice bylaws further reiterates that unambiguous bylaws should be enforced according to their terms.

- Nonetheless, Delaware courts will continue to conduct an equitable review of an incumbent board's decision to reject a nomination notice even if that notice failed to comply with unambiguous terms of the advance notice bylaw.

- Prior Court of Chancery decisions approached the standard of review for this equitable review slightly differently. While the courts generally agreed equitable review was appropriate, not all expressly applied enhanced scrutiny. The decision in *AIM* expressly applied enhanced scrutiny and clarified that, in the context of an advance notice bylaw, the burden is on the incumbent board to demonstrate it acted reasonably by identifying proper corporate objectives and justifying its actions as reasonable in relation to those objections.

- However, this decision, consistent with the court's other recent decisions on advance notice bylaws, further indicates that, as a practical matter, clear and unambiguous bylaws adopted on a "clear day" in order to achieve the legitimate goal of an orderly corporate electoral process are unlikely to fail equitable review in the absence of specific evidence of inequitable conduct.

- Furthermore, this decision demonstrates that advance notice bylaws remain an important and legitimate tool for incumbent boards to protect the corporation and its stockholders from undisclosed arrangements by individuals or groups seeking corporate control.[13]

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ENDNOTES:

[1]*See* Skadden Discusses Delaware Court Rulings on Advance Notice Bylaws and Incumbent Director Conduct, (https://www.skadden.com/-/media/files/publications/2022/06/skadden_discusses_delaware_court_rulings_on_advance_notice_bylaws_and_incumbent_director_conduct.pdf), The CLS Blue Sky Blog, June 29, 2022; *see also Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. 2021); *Strategic Investment Opportunities LLC v. Lee Enterprises, Incorporated*, 2022 WL 453607 (Del. Ch. 2022).

[2]*Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *15 (Del. Ch. 2021); *Strategic Investment Opportunities LLC v. Lee Enterprises, Incorporated*, 2022 WL 453607, at *14 (Del. Ch. 2022).

[3]*Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. 2022).

[4]*Id.* at *11.

[5]*Id.* (citation omitted).

[6]*Id.* at *12.

[7]*Id.* at *14.

[8]*Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, Fed. Sec. L. Rep. (CCH) P 93965 (Del. Ch. 1988).

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[9]*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, Fed. Sec. L. Rep. (CCH) P 92046, Fed. Sec. L. Rep. (CCH) P 92077 (Del. 1985).

[10]*Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834, at *15 (Del. Ch. 2022) (citation omitted).

[11]*Id.* (citation omitted).

[12]*Id.* (citation omitted).

[13]Despite their acceptance by the Delaware courts, advance notice bylaws remain a continuing focus of litigation and dissident stockholders can be expected to continue challenging the adoption, amendment and/or scope of such bylaws when seeking to make director nominations. *See, e.g., Politan Capital Management LP v. Kiani*, 2022-0948-NAC (Del. Ch.).

IRS ISSUES GUIDANCE ON EXCISE TAX ON STOCK REPURCHASES AND CORPORATE ALTERNATIVE MINIMUM TAX

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On Tuesday, December 27, 2002, the Treasury Department and IRS issued notices providing initial guidance on the stock repurchase excise tax (the "Excise Tax," and such notice, the "Excise Tax Notice"),[1] which is generally applicable to public U.S. corporations, and the corporate alternative minimum tax (the "CAMT," and such notice, the "CAMT Notice"),[2] both of which were imposed by the Inflation Reduction Act of 2022 (H.R. 5376) (the "IRA") and are effective January 1, 2023. The notices describe the regulations that the IRS and Treasury plan to issue regarding these taxes and a limited set of key issues they raise. Importantly, taxpayers are generally permitted to rely on these notices before the regulations come into effect.[3]

Consistent with the IRA, the Excise Tax Notice confirms that the Excise Tax captures a much broader set of transactions than typical stock redemptions (*e.g.,* split-offs, certain acquisitive reorganizations, preferred stock redemptions and so-called "bootstrap" acquisitions), but certain rules set forth in the Excise Tax Notice may generally mitigate the tax where stock is repurchased in exchange for non-recognition property. In addition, in certain respects, the Excise Tax Notice provides helpful guidance and relief (*e.g.*, stock redemptions in liquidation of a SPAC will generally not be subject to the tax).

The CAMT Notice provides for several adjustments to "adjusted financial statement income" ("AFSI"), which is the base for the imposition of the CAMT, in situations where a taxpayer may have income or loss for financial accounting purposes but not for regular corporate income tax purposes. These adjustments should shift the CAMT computational tax base toward the computational tax base of the regular corporate income tax, in many cases minimizing potential CAMT liability and its applicability.

1% Stock Repurchase Excise Tax

Key Takeaways

- Redemptions made in complete liquidation of corporations (including SPACs) generally are not subject to the Excise Tax.
- Generally, the cash component (but not the stock component) of consideration received in certain acquisitive reorganizations, recapitalizations, and split-offs is subject to the Excise Tax.
- Preferred stock redemptions are generally subject to the Excise Tax.
- The cash received from a target corporation in a so-called bootstrap acquisition is generally treated as a repurchase subject to the Excise Tax.
- Stock repurchases occurring pursuant to reorganization transactions where cash is paid in lieu of

fractional shares typically are excluded from the Excise Tax.

- The Excise Tax Notice provides conventions for determining the fair market value of repurchased stock (on which the Excise Tax is assessed), generally looking to public trading price indicators.

- Taxpayers may rely on the Excise Tax Notice until the issuance of forthcoming proposed regulations, although it is unclear when such regulations will be issued.

Analysis

In General. As noted in our Client Memo on the IRA,[4] the Excise Tax imposes a non-deductible 1% excise tax on repurchases after December 31, 2022 of any stock of any U.S. corporation that has any publicly traded shares (a "Covered Corporation").[5] The Excise Tax is imposed on the fair market value of the stock "repurchased" (or deemed repurchased) during the taxable year, *minus* the fair market value of any stock "issued" by such corporation during the taxable year (the "Netting Rule"), and *minus* the fair market value of "qualifying property" (generally, stock received in certain acquisitive reorganizations or split-offs that would otherwise be subject to the tax during the taxable year).[6] "Repurchase" is defined as a redemption[7] and any economically similar transaction, as well as the acquisition of a Covered Corporation's stock by certain of its affiliates from a third party. The statute is broadly drafted and so is the Excise Tax Notice; the Excise Tax covers a broader range of transactions than a typical open-market repurchase of shares, generally including the redemption of preferred stock, cash consideration received in certain acquisitive reorganizations and split-offs, and cash consideration received from a target in certain so-called "bootstrap" acquisitions.

Preferred Stock Redemptions Are Subject to Excise Tax. The Excise Tax Notice confirms that a Covered Corporation's redemption of preferred stock, which includes the redemption of "participating" preferred stock, is subject to the Excise Tax where the redeemed property is stock for federal income tax purposes and the repurchase is a redemption within the meaning of section 317(b). For example, where a Covered Corporation has outstanding, publicly traded common stock and non-publicly traded, mandatorily redeemable preferred interests that are stock for federal income tax purposes, redeeming the preferred stock generally triggers the Excise Tax.[8]

Exceptions to the Stock Repurchase Excise Tax

- *Complete Liquidations*. The Excise Tax as drafted could encompass a wide range of transactions and corporate actions, including SPAC redemptions (which can occur pursuant to SPAC extension votes, prior to a business combination, or upon liquidation). However, the Excise Tax Notice clarifies that a redemption occurring pursuant to a complete liquidation of a Covered Corporation is not a "repurchase." This would generally include SPAC liquidations.[9] Other SPAC redemptions not in liquidation (*e.g.*, if certain shareholders elect to be redeemed in connection with a de-SPAC transaction, or pursuant to a redemption right triggered when a SPAC seeks an extension of its term) would still be subject to the Excise Tax, though the Netting Rule may apply to reduce or eliminate the Excise Tax that would otherwise apply to a SPAC redemption not in liquidation.

- *Qualifying Property in Acquisitive Reorganizations*. In an acquisitive reorganization (*i.e.*, an A reorganization (including triangular reorganizations), a C reorganization or an acquisitive D reorganization), a recapitalization (*i.e.*, an E reorganization) or a mere change in a Covered Corporation's identity, form, or place or organization (*i.e.*, an F reorganization), the use of acquirer's stock as consideration is excluded from the tax base to which the stock repurchase Excise Tax applies.[10] To the extent other consid-

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eration (*e.g.*, cash) is used, however, the tax base is not reduced by the extent of such nonqualified consideration.[11] The effect is that the Excise Tax applies to cash consideration received in these transactions.

- *Split-Offs*. Similarly, the Excise Tax Notice specifies that a Covered Corporation's use of controlled corporation stock in a split-off, in exchange for such Covered Corporation's own stock, is excluded from the tax base to which the Excise Tax applies.[12] If the split-off includes a distribution of other consideration that is not qualifying property (*i.e.*, property permitted to be received on a tax-free basis) like cash, however, the tax base is not reduced by such nonqualified consideration.[13] The effect is that the Excise Tax applies to cash consideration received in these transactions. Note that a distribution by a distributing corporation of stock of a controlled corporation in a tax-free transaction under section 355 that is not a split-off is not treated as a repurchase (and therefore is not subject to the Excise Tax) (*e.g.*, a pro rata spin-off).[14]

- *Bootstrap Acquisitions*. The Excise Tax Notice provides that, to the extent that the consideration in an acquisition is funded by the target corporation's own cash or borrowed cash, the target is treated as repurchasing its own stock in a transaction subject to the Excise Tax. For example, in a transaction where a parent corporation acquires a target using a merger subsidiary that borrows funds and merges with and into the target and the target's shareholders exchange all of their stock for cash, the target is treated as if it redeemed its stock in a repurchase to the extent that its own cash (including cash attributable to such debt-financing) funded the transaction and is subject to the Excise Tax.[15] An acquiror may consider whether to avoid using this fairly typical leveraged buyout structure and consider alternative means for pushing debt into a target, subject to financing and other non-tax considerations.

- *Dividends*. The Excise Tax Notice provides that a repurchase is not subject to the Excise Tax to the extent that it is treated as a dividend for federal income tax purposes[16]. Most ordinary course repurchases are, however, subject to a rebuttable presumption that they do not qualify for this exception.[17] Covered Corporations can rebut this presumption for a given repurchase from a given shareholder by establishing "sufficient evidence" that such shareholder treats the repurchase as a dividend on such shareholder's federal income tax return. "Sufficient evidence" requires, among other things, proper information reporting by the Covered Corporation, evidence of any applicable withholding, a certification from the shareholder and evidence of the Covered Corporation having sufficient earnings and profits.[18]

- *Determining Fair Market Value of Repurchased Shares*. The Excise Tax Notice specifies that the "fair market value" of the repurchased stock is the market price of the stock on the date that it is repurchased, regardless of whether the price at which the stock is repurchased equals such market price. If any stock of the same class and issue of the repurchased stock is traded on an established securities market, the guidance provides various acceptable methods for deriving market price.[19] Covered Corporations must consistently use a chosen method for all stock repurchases during its taxable year.[20]

Corporate Alternative Minimum Tax on Book Income

General CAMT Framework. The CAMT imposes tax on large corporations that are profitable from a book perspective but are subject to no or low federal income tax. The CAMT applies at a rate of 15% to an "applicable corporation," which generally is any corporation (other than an S corporation, a RIC or REIT) whose average annual ASFI exceeds $1 billion over the three taxable years ending with the current taxable year (the "Book Income Test").[21] AFSI is derived from the

net income or loss reported on an applicable corporation's "applicable financial statement" ("AFS") covering such taxable year. An AFS generally is an annual report or other SEC-required financial statements. Significantly, the CAMT Notice does not provide a way for an applicable corporation to cease to be an applicable corporation.[22]

Aligning AFSI With Regular Corporate Income Tax. Generally, CAMT liability is determined using a different computational tax base (generally, GAAP) than the regular corporate income tax. Because CAMT liability is tied to the financial accounting rules (*e.g.*, GAAP), where such rules diverge from the regular corporate income tax rules there can be dramatic variations in the applicable tax bases. In particular, where a transaction results in income from a financial accounting perspective but that income is not recognized for purposes of the regular corporate income tax, the CAMT could result in significantly higher tax liability due to the larger CAMT tax base. The CAMT Notice generally brings the CAMT tax base more in line with that of the regular corporate income tax (thereby mitigating the potential for corporations to qualify as applicable corporations and mitigating the potential of significant CAMT liability if they do so qualify) by providing for adjustments to AFSI in certain instances where a corporation books a transaction as producing income or loss for financial accounting purposes but does not recognize income or loss for regular corporate income tax purposes. Specifically:

- *Certain Reorganizations and Split-off Transactions*. Certain reorganizations and split-off transactions may result in financial accounting gain or loss (and corresponding basis adjustments in assets) but are treated as tax-deferred for regular corporate income tax purposes. The CAMT Notice provides that in those cases, AFSI will not include any gain or loss recognized for financial accounting purposes.[23]

- *Cancellation of Indebtedness*. Certain transactions (including certain reorganizations) give rise to income as a result of cancellation of indebtedness for financial accounting purposes, but do not result in income recognition for regular corporate income tax purposes because the cancellation of indebtedness income is excluded from the corporate income tax computational tax base. To shift the CAMT tax base toward that of the regular corporate income tax and to mitigate the harshness of a rule imposing tax on book income arising from the cancellation of indebtedness income for distressed companies, the CAMT Notice provides that AFSI will not include the amount of any excluded cancellation of indebtedness income.[24]

- *Correlative Basis and Attribute Adjustments*. In each of the above cases, the CAMT Notice requires the relevant taxpayer to, for purposes of calculating AFSI, make a correlative basis adjustment to the stepped-up (or stepped-down) basis such taxpayer would receive under the financial accounting rules. That is, for example, where a transaction produces income for financial accounting purposes but such income is excluded from AFSI under the CAMT Notice,[25] any step-up in the basis of the assets resulting from such income under the financial accounting rules is ignored and AFSI ignores any such step-up (and corresponding depreciation or amortization deductions) going forward.[26] Likewise, the CAMT Notice requires that any tax attributes that an applicable corporation reduces under the cancellation of indebtedness rules for corporate income tax purposes must have a corresponding decrease in such attributes (including basis) for financial accounting purposes, when calculating AFSI. These correlative adjustments preclude taxpayers from receiving a double benefit of AFSI exclusion and, for example, increased book depreciation that would reduce AFSI.[27]

Determining "Applicable Corporation" Status and Other. The CAMT Notice includes several clarifica-

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tions regarding how to determine applicable corporation status (including in acquisitions and in spin-offs and split-offs) and provides a safe harbor method for determining applicable corporation status, under which a corporation is an applicable corporation only if its book income is at least $500,000,000 under a modified Book Income Test.[28] The CAMT Notice also addressed certain technical aspects of the depreciation deductions and tax credits that are beyond the scope of this article.

ENDNOTES:

[1]*See* Notice 2023-02.

[2]*See* Notice 2023-07.

[3]Notice 2023-02, § 1; Notice 2023-07, § 5.03. Reliance on the Excise Tax Notice and the CAMT Notice is permitted upon the publication of the notices in the Federal Register.

[4]*See* https://www.paulweiss.com/practices/transactional/tax/publications/inflation-reduction-act-imposes-corporate-minimum-tax-and-an-excise-tax-on-stock-repurchases?id=43645.

[5]The Excise Tax also applies to certain corporations that have expatriated and are subject to the "inversion rules" of section 7874. Unless otherwise provided, all section references are to the Code, as amended. Special rules govern the applicability of the Excise Tax to repurchases of stock of certain foreign corporations. *See generally* Notice 2023-02, § 2.04.

[6]Certain "issuances" are excepted where the effect of the issuance would be to reduce artificially a Covered Corporation's Excise Tax liability as permitted by the Netting Rule (*i.e.*, a Covered Corporation's issuance of stock with respect to its existing stock). *See* Notice 2023-02, § 3.08(4). In addition, the Excise Tax Notice does not permit carryforwards or carrybacks of unused reductions under the Netting Rule. *See* Notice 2023-02, § 3.03(3)(c). Each year stands on its own for these purposes.

[7]Specifically, redemptions within the meaning of section 317(b), which applies to a corporation acquiring its stock from a shareholder in exchange for property (but excluding exchanges for the corporation's own stock or rights to acquire the corporation's stock).

[8]*See* Notice 2023-02, §§ 3.04(2)(a) & 3.09, Ex. 1. The Excise Tax Notice provides that the fair market value of non-publicly traded stock is to be calculated in accordance with any reasonable valuation method under the principles of Treasury Regulation section 1.409A-1(b)(5)(iv)(B)(1). *See* Notice 2023-02, § 3.06(2)(b). In certain cases, it may be possible that a redemption would be treated as a "dividend" under the general rules of section 302. As discussed below, the notice contains a rebuttable presumption that the redemption is a repurchase, but it appears that a corporation could rebut that presumption in the case of a redemption of preferred stock using certain rules, to the extent they are applicable on any given facts.

[9]Specifically, section 331 but not section 332(a) must apply. Notice 2023-02, §§ 3.04(4)(b)(i) & 3.09, Ex. 16. Moreover, the Excise Tax applies in certain liquidations but generally requires an 80% corporate owner. As a result, the Excise Tax typically will not apply to a SPAC liquidation.

[10]Notice 2023-02, § 3.07(2)(a).

[11]Notice 2023-02, § 3.09, Ex. 6.

[12]Notice 2023-02, § 3.07(2)(d).

[13]*See* Notice 2023-02, § 3.09, Ex. 11.

[14]*See* Notice 2023-02, § 3.04(4)(b)(ii).

[15]*See* Notice 2023-02, § 3.09, Ex. 3.

[16]Notice 2023-02, § 2.05(2)(f).

[17]Specifically, repurchases to which section 302 or 356(a) apply. Notice 2023-02, § 3.07(6)(b).

[18]*See* Notice 2023-02, § 3.07(6)(b).

[19]Specifically, any of: (i) the daily volume-weighted average price as determined on the repurchase date; (ii) the closing price on the repurchase date; the average of the high and low prices on the repurchase date; and (iii) the trading price at the time of the repurchase. In addition, if the repurchase date is not a trading day, the market price is determined by reference to the immediately preceding trading day. Notice 2023-02, § 3.06(2)(a)(i).

[20]*See* Notice 2023-02, § 3.06(2)(a). The Excise Tax Notice also provides guidance for determining the market price of repurchased stock that is not traded on an established securities market or denominated in a non-U.S. currency. *See* Notice 2023-02, § 3.06(2)(b)-(c).

[21]There are special AFSI tests for corporations that are members of foreign-parented multinational groups (as defined in section 59(k)(2)(B)), corporations whose three-taxable-year periods include a taxable year that is less than 12 months and corporations in existence for less than three years.

[22]Once a corporation meets the Book Income Test, it remains an applicable corporation unless (a) Trea-

sury determines such treatment is no longer appropriate and (b) either (i) there is a change in ownership (of an undefined nature) or (ii) its AFSI falls below the relevant threshold for a requisite number of consecutive years, as determined by Treasury. *See* section 59(k)(1)(C). Accordingly, without guidance, once an applicable corporation is an applicable corporation, it appears it will remain an applicable corporation.

[23]Notice 2023-07, § 3.03(1)(a).

[24]Notice 2023-07, § 3.06(1)(a).

[25]Notice 2023-07, § 3.03(1)(a).

[26]Notice 2023-07, § 3.03(2).

[27]Notice 2023-07, § 3.06(2).

[28]Notice 2023-07, § 5.03(2).

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