The New Proposed Excise Tax Regulations

By Grant Dalbey*

Two sets of proposed regulations under Code Sec. 4501[1] (the "Proposed Regulations") were published to the federal register on April 12, 2024 that provide guidance on the excise tax imposed on stock repurchases (the "excise tax").[2] One set of the Proposed Regulations contains substantive rules that address the application of the excise tax, and the other provides procedural guidance regarding the reporting and payment requirements for the excise tax. This article gives an overview of certain rules in the Proposed Regulations as they relate to financial products.[3]

Background

H.R. 5376 (commonly called the "Inflation Reduction Act" or "IRA") introduced a one-percent excise tax on repurchases of stock by certain publicly traded companies defined as "covered corporations" (*i.e.*, domestic corporations with stock traded on an established securities market) occurring after December 31, 2022. "Repurchase" for these purposes is defined as a redemption within the meaning of Code Sec. 317(b), which generally includes any acquisition by a corporation of its stock from a shareholder in exchange for property, except for its stock or rights to acquire its stock. The statute also provides that a repurchase includes any transaction determined by Treasury to be economically similar to a repurchase. The excise tax is imposed on the fair market value ("FMV") of stock repurchased (or treated as repurchased). There is a "Netting Rule" that states the value of stock treated as repurchased during the taxable year for purposes of computing the excise tax is reduced by the value of any new issuances of stock by the corporation during the same taxable year. There are six exceptions to the excise tax under the statute: (i) to the extent a repurchase is part of a reorganization under Code Sec. 368(a) and no gain or loss is recognized by the shareholder; (ii) if the stock repurchased or an amount of stock equal to the value of such stock is contributed to an employer-sponsored retirement plan, an employee stock ownership plan, or similar plan; (iii) if the total value of the stock repurchased during the tax year does not exceed $1 million; (iv) under regulations prescribed by Treasury, repurchases by dealers in securities in the ordinary course of business (the "Dealer Exception"); (v) repurchases

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by regulated investment companies or real estate investments trusts; and (vi) repurchases treated as dividends.

On December 27, 2022, Notice 2023-2[4] (the "ET Notice") was released and set forth a number of proposed rules for the application of the excise tax.[5] The ET Notice indicated that forthcoming proposed regulations would implement rules similar to those contained in the ET Notice. The Proposed Regulations are consistent in many respects with the ET Notice but also depart in notable ways, as discussed further below.

Financial Product Considerations

Definition of Stock and Additional Tier 1 Preferred Stock

For purposes of the excise tax, the Proposed Regulations define "stock" as any instrument issued by a corporation that is stock (including treasury stock) or that is treated as stock for federal tax purposes at the time of issuance, regardless of whether the instrument is traded on an established securities market.[6] However, the Proposed Regulations exclude "additional tier 1 preferred stock" from the definition of stock for excise tax purposes.[7] Accordingly, repurchases of additional tier 1 preferred stock are not subject to the excise tax. Similarly, issuances of additional tier 1 preferred stock are not taken into account for purposes of the Netting Rule. This exclusion is relevant for certain financial institutions subject to regulatory capital standards. Additional tier 1 preferred stock is preferred stock that, for regulatory capital purposes, qualifies as additional tier 1 capital and does not qualify as common equity tier 1 capital.[8]

The exclusion for additional tier 1 preferred stock was incorporated in response to several commenters who noted that the issuance and redemption of additional tier 1 preferred stock is primarily used as a way for financial institutions to manage regulatory capital and liquidity risk. Commenters contrasted this purpose against repurchases used as a mechanism to enhance shareholder returns, which is the apparent underpinning policy concern behind the enactment of the excise tax. Commenters also noted that financial institutions are not able to redeem or repurchase additional tier 1 preferred stock without prior approval from regulators, and the terms of such stock may place restrictions on repurchases. Financial institutions may have a regular program for issuing and redeeming additional tier 1 preferred stock that result in net issuances when viewed over a long period of time. However, delays in the regulatory approval process for repurchases could result in timing mismatches between issuances and repurchases, and thus, result in significant excise taxes in certain years.[9] Accordingly, the exclusion for additional tier 1 preferred stock from the excise tax seems to be a welcome relief for financial institutions.

Outside of the exclusion for additional tier 1 preferred stock, repurchases of all types of stock by a covered corporation (*e.g.*, common, preferred, publicly traded, privately held) would be subject to the excise tax. Commenters recommended that the excise tax should not apply to redemptions of preferred stock, and in particular, "straight preferred stock" and "mandatorily redeemable stock." The commenters contended that such stock does not implicate the policy concerns underlying the stock excise tax. Treasury, however, did not adopt these suggestions, citing to the plain language of Code Sec. 4501 which consistently uses the term "stock" without providing any exceptions and noting that such suggestions would hamper the Internal Revenue Service's (IRS') ability to administer and enforce the excise tax and cause uncertainty.[10]

Convertible Debt

The preamble to the Proposed Regulations confirms that redemptions of convertible debt are not subject to the excise tax.[11] The preamble continues, stating that for purposes of the excise tax, whether an instrument is debt or equity should be determined at the time of issuance, and this characterization should not be retested while the debt instrument is outstanding.[12] This notion is reflected in the definition of "stock" in Proposed Reg. §58.4501-1(b)(29). The preamble further states that the term "repurchase" includes only Code Sec. 317(b) redemptions with regard to "stock" of a covered corporation as well as transactions that "economically similar" to such redemptions.[13] Transactions involving convertible debt are not on the exclusive list of economically similar transactions (discussed below). Thus, Treasury felt that no special rules were needed in the Proposed Regulations to address convertible debt.[14] Nonetheless, it is helpful that the preamble confirms this point. Similarly, the issuance of a convertible debt instrument should not be taken into account for purposes of the Netting Rule. Notably, however, if a convertible debt instrument is physically settled with the issuance of stock, the issuance of such stock seems to be considered an issuance for purposes of the Netting Rule.

Options

As noted above, the term "stock" is defined to mean any instrument issued by a corporation that is stock or that

is treated as stock for federal tax purposes at the time of issuance. Accordingly, the definition of stock generally excludes options (other than options that are treated as stock for federal tax purposes, discussed further below). However, to the extent that an option is physically settled with stock it would have implications for excise tax purposes. More specifically, if a covered corporation acquires its stock upon physical settlement of an option, it would be a repurchase. Conversely, if a covered corporation issues stock upon physical settlement of an option it would be taken into account for purposes of the Netting Rule.

The amounts taken into account would be the FMV of the shares on the date of exercise, rather than the strike price of the option. This approach is consistent with the ET Notice and is embedded in the proposed rules regarding the FMV of repurchased or issued stock.[15] On the other hand, the cash settlement of an option contract or other derivative is generally not treated as involving a deemed issuance or repurchase of shares for purposes of the excise tax.[16]

Special rules apply to instruments that are not in the legal form of stock but are nonetheless treated as stock for federal tax purposes ("Tax Only Stock"). The preamble refers to the issuance of "deep-in-the-money" options[17] as instruments that may be considered Tax Only Stock to the extent they are considered constructively exercised at the time of issuance under federal tax principles. The preamble explains that the Treasury and the IRS are concerned that allowing taxpayers to immediately offset current repurchases by issuing instruments that are not in the legal form of stock but nonetheless treated as stock for federal tax purposes at issuance may create the potential for abuse.[18] For example, a taxpayer seeking to avoid the excise tax might issue deep-in-the-money call options, which the taxpayer takes the position of being treated as stock for federal tax purposes, to accommodation parties with the mutual understanding that such options would never be exercised. Notably, issuing deep-in-the-money options as opposed to stock would likely be easier and less costly from a legal, regulatory, and practical perspective.

Accordingly, the Proposed Regulations provide an anti-avoidance rule to address this concern. The issuance of Tax Only Stock would not be treated as an issuance for purposes of the Netting Rule until the instrument is repurchased. The amount of the issuance under the Netting Rule would be limited to the lesser of the FMV of the instrument at issuance or repurchase and the taxpayer would need to timely report the repurchase of Tax Only Stock. A consistency requirement provides that a taxpayer that fails to timely report a repurchase of Tax Only Stock is generally not entitled to regard any issuances of comparable Tax Only Stock for purposes of the Netting Rule within five taxable years.[19]

One set of the Proposed Regulations contains substantive rules that address the application of the excise tax, and the other provides procedural guidance regarding the reporting and payment requirements for the excise tax.

Notwithstanding the rules above for issuances, the repurchase of Tax Only Stock (*e.g.*, a cash settlement of a deep-in-the-money option) is treated as a repurchase, regardless of the legal form of such instrument.[20]

Integrated Debt Instruments

The Proposed Regulations address the application of the excise tax to integrated debt instruments under Reg. §1.1275-6. In general, Reg. §1.1275-6 provides for the tax integration of a "qualifying debt instrument" with a "Reg. §1.1275-6 hedge" or combination of Reg. §1.1275-6 hedges in certain circumstances. A common transaction to which Reg. §1.1275-6 applies involves a convertible debt instrument as well as one or more options or other financial instruments involving underlying stock that hedges dilution risk, provided certain conditions are satisfied. Under Reg. §1.1275-6(f), unless otherwise provided in published guidance, the synthetic debt instrument resulting from the integrated transaction is recognized as a single debt instrument for federal tax purposes during the period of time it qualifies for such treatment. Such a transaction is not subject to federal income tax rules that would apply on a separate basis to the instruments comprising the integrated transaction if it were not integrated.

The preamble states that Treasury and the IRS are of the view that the determination of whether and when stock is repurchased or issued for purposes of the excise tax should be determined without regard to the integration rules of Reg. §1.1275-6.[21] Accordingly, Proposed Reg. §1.1275-6(f)(12)(iii) states that, solely for purposes

of the excise tax, a taxpayer must apply the rules that would apply on a separate basis to the components of the integrated transaction rather than the rules that would otherwise apply to the integrated transaction under Reg. §1.1275-6.

Valuation and Timing

With respect to valuation and timing, the Proposed Regulations contain rules similar to the ET Notice. The FMV of repurchased or issued stock is generally its market price (regardless of whether the market price is the price at which the stock was repurchase/issued).[22] Further, the FMV is generally determined at the time in which ownership of the stock is transferred for tax purposes.[23] Additionally, the Proposed Regulations clarify that the trade date (as opposed to the settlement date) is used as the date of repurchase for a regular-way sale of stock on an established securities market.[24] The Proposed Regulations contain more detailed rules on the various methods to use for these purposes.[25] Commenters advocated for an exception to the FMV rules if a covered corporation was in bankruptcy or insolvent, however, Treasury did not agree with this recommendation.[26]

The Proposed Regulations offer helpful and unsurprising guidance in many respects. However, with respect to the funding rules, the Proposed Regulations have introduced additional uncertainties for taxpayers. Taxpayers affected by these rules should be aware of the various issues and be prepared to take supportable positions.

Similar to the rules in the ET Notice, these rules would provide clarity on how to apply the operative rules of the excise tax to certain derivative transactions that are based on a covered corporation's stock. For example, certain derivative products such as accelerated share repurchase transactions ("ASRs") or capped calls may result in the receipt of shares of a taxpayer's stock in exchange for consideration that may not equal the FMV of the stock at the time of the transaction and may result in the receipt of shares at various dates. Prior to guidance, it was unclear what the FMV was for purposes of the excise tax and when to treat the stock as repurchased. The proposed rules would clarify that the excise tax is generally levied on the FMV of the stock at the time that tax ownership of the stock is transferred (rather than being based on the amount or timing of a payment under the arrangement).

The Proposed Regulations includes an example of the application of the excise tax to an ASR.[27] The example is the same as the ASR example in the ET Notice. In the example, Corporation X entered into an ASR on October 10, 2022, with an investment bank ("Bank"). Under the ASR, Bank agrees to deliver a number of shares of Corporation X stock to Corporation X during the term of the ASR, in an amount determined by reference to the price of Corporation X's stock on specified days during the term of the ASR. Pursuant to the ASR agreement, Corporation X paid Bank a prepayment amount and Bank delivered 80x shares of Corporation X stock on October 12, 2022, that it had borrowed in the open market. The example provides that the terms of the ASR and the facts and circumstances cause tax ownership of such shares to transfer to Corporation X at that time (that is, October 12, 2022). On final settlement of the ASR, on February 1, 2023, Bank delivers an additional 20x shares to Corporation X. The example indicates that for federal income tax purposes, ownership of those 20x shares is treated as transferring from Bank to Corporation X at the time of delivery (that is, February 1, 2023). The analysis of the example concludes that Corporation X is treated as repurchasing 80x shares of stock on October 12, 2022 (that is, the date on which ownership of the 80x shares delivered by Bank transferred from Bank to Corporation X). Thus, the 80x share repurchase is not subject to the excise tax because it occurred prior to December 31, 2022. The 20x share repurchase, however, increases Corporation X's stock repurchase excise tax base for its 2023 taxable year because tax ownership was transferred on February 1, 2023.

Dealer Exception

As discussed above, there is an exception to the excise tax "under regulations prescribed by the Secretary, in cases in which the repurchase is by a dealer in securities in the ordinary course of business."[28] The ET Notice clarified that "dealer in securities" is defined by reference to Code Sec. 475(c)(1). Additionally, the ET Notice indicated that the Dealer Exception applies solely to the extent that (i) the

dealer accounts for the stock as securities held primarily for sale to customers in the dealer's ordinary course of business, (ii) the dealer disposes of the stock within a time period consistent with the holding of the stock for sale to customers in the ordinary course of business (taking into account the prevailing market), and (iii) the dealer does not sell or otherwise transfer the stock to certain related parties. Further, any stock issued by a covered corporation that is a dealer in securities is not treated as issued to the extent the stock is issued, or otherwise is used to satisfy obligations to customers arising, in the ordinary course of the dealer's (or certain related dealer's) business of dealing in securities.

The Proposed Regulations retain these rules from the ET Notice.[29] This guidance is not surprising. As expected, the repurchase activity must be connected with the dealer's security business to qualify for the Dealer Exception. The exception is likely aimed at broker dealers that purchase and sell various stocks to fulfill customer obligations. While many taxpayers may meet the definition of a dealer in securities under Code Sec. 475(c)(1), typical stock buy-back transactions likely will not be within the scope of the Dealer Exception unless the repurchase is made in connection with the taxpayer's dealer business.

Economically Similar Transactions

Similar to the ET Notice, the Proposed Regulations provide an *exclusive* list of transactions that are treated as economically similar to repurchases.[30] The list is similar to the list in the ET Notice, as modified to account for other changes in the Proposed Regulations. The list includes a number of corporate actions, such as certain reorganizations, split-offs, and complete liquidations. Because this list is exclusive, and because the statute specifically requires Treasury to determine which transactions are economically similar, transactions not on the exclusive list would not be considered economically similar to a repurchase.

Commenters recommended that any future transactions added to the list of economically similar transactions apply prospectively. Treasury did not adopt this comment. The preamble states that the Treasury and the IRS are of the view that additional transactions added to the list of economically similar transactions should not be required to be applied solely on a prospective basis. The preamble continues by stating, although the Treasury Department and the IRS anticipate that *most* transactions treated as economically similar transactions would be treated as such only on a prospective basis, there may be transactions that warrant retroactive application.[31]

The Funding Rule

Code Sec. 4501(d) indicates that, in the case of an applicable foreign corporation (generally a publicly traded foreign corporation, referred to herein as "foreign parent"), the repurchase of such foreign parent's stock by an applicable specified affiliate (generally a U.S. subsidiary) of the foreign parent could be subject to the excise tax. The rule was proposed to be expanded in the ET Notice with a rule (the "Notice funding rule"), which would provide that the applicable specified affiliate is treated as repurchasing such stock if (i) the applicable specified affiliate funds by any means (including through distributions, debt, or capital contributions) the repurchase of stock of the foreign parent, and (ii) such funding is undertaken with a principal purpose of avoiding the excise tax. The Notice funding rule also provided that a principal purpose of avoiding the excise tax was *per se* presumed to be present if the funding (other than through distributions) occurs within two years of a foreign corporation's stock repurchase.

The Notice funding rule, and in particular, the *per se* language faced strong opposition from commenters.[32] The Proposed Regulations would modify the Notice funding rule. More specifically, the Proposed Regulations provide that an applicable specified affiliate is treated as acquiring stock of its foreign parent to the extent it funds by any means (including through distributions, debt, or capital contributions), directly or indirectly a "covered purchase"[33] of the stock of that foreign parent with a principal purpose of avoiding the excise tax (a "covered funding").[34] The *per se* language from the ET Notice was removed. However, the Proposed Regulations provide that if, based on all the facts and circumstances, *a* principal purpose of the covered funding *is to fund, directly or indirectly*, a covered purchase, then there is a principal purpose of avoiding the excise tax.[35] These critical terms are not further defined, and no exception is provided to exclude ordinary course transactions. Notably, there was a statement in an accompanying release to the regulations indicating that the funding rule is not intended to inadvertently capture ordinary course intercompany funding transactions.[36] This intent, however, is not apparent, as the rule still seems to be relatively broad.

The Proposed Regulations would expand upon the Notice funding rule in another respect, to address a potential "downstream" situation where a U.S. subsidiary transfers funds to a lower-tier foreign entity, and that

lower-tier foreign entity purchases the foreign parent stock. In this situation (which is expected to be rare), there is a rebuttable presumption that the principal purpose requirement is met if an applicable specified affiliate funds by any means a "downstream relevant entity" (generally a company 25% owned by the applicable specified affiliate) and the funding occurs within two years of a covered purchase by or on behalf of the downstream relevant entity. This situation is not expected to be all that common. Note that this rebuttable presumption is limited to the context of the downstream rule—it does not apply to the main aspect of the funding rule, where if "a" principal purpose of a funding by an applicable specified affiliate "is to fund, directly or indirectly," a repurchase, the applicable specified affiliate would be subjected to the excise tax.

The Proposed Regulations provide ordering rules, such that, a covered purchase is treated as made first from covered fundings such that, to the extent there is both a covered funding and a covered purchase subject to the proposed funding rule, such covered purchase is treated as funded by the covered funding before fundings received from other sources.[37]

Thus, the Proposed Regulations functionally contain two potential funding rules—one (the "New Funding Rule") that roughly corresponds to the Notice funding rule, and a second one (the "Downstream Rule") that applies with reference to fundings through lower-tier entities. Notably, the New Funding Rule is in certain respects broader than the Notice funding rule. So, although the *per se* language was removed, there is still a significant amount of uncertainty on the scope of the excise tax to "inbound" organizations.

For example, the New Funding Rule introduces tax uncertainty to distributions and ordinary course financing transactions between U.S. subsidiaries and foreign affiliates, such as cash pooling arrangements and other intercompany loans.[38] Under the Proposed Regulations, it appears that all transactions between U.S. subsidiaries and foreign affiliates (including ordinary course financing transactions) will need to be evaluated to determine whether the facts and circumstances indicate that "a" principal purpose of the transaction is to "fund, directly or indirectly" a repurchase of the foreign parent's stock. Notably, the New Funding Rule does not require that the principal purpose behind the transaction is to avoid the excise tax—it merely requires that *a* principal purpose behind the funding *is to fund a repurchase*. This seems to be an important distinction. It is also notable that there is no time limit imposed to connect a funding to a covered purchase (unlike the *per se* language in the ET Notice). Also, the *per se* language did not apply to distributions, while the new language in the Proposed Regulations does not carve out distributions.

Typically, foreign parents receive funds from both U.S. and non-U.S. entities (and external sources) and use these funds for various purposes, such as paying distributions, funding business activity, redeploying cash to other subsidiaries, funding repurchases, and more. Given the fungibility of cash, the preamble states that the Proposed Regulations do not adopt a tracing approach to determine which funding sources were used for which purposes. However, the Proposed Regulations do not answer how the purposes of a particular cash outlay are determined in the typical context of a foreign parent's receipt of funds from various internal and external sources to be used for varying purposes. The language in the Proposed Regulations—"funds by any means (including through distributions, debt, or capital contributions), directly or indirectly"—can cover an extraordinarily broad range of situations. These proposed rules have continued to receive pushback by commenters.[39]

Procedural Notes

The Proposed Regulations contain information about the annual reporting and payment requirements associated with the excise tax for tax years ending before and after final regulations are published.[40] Importantly, reporting and payment are not required until after the final regulations are published. Thus, although the tax applies to repurchases occurring on or after January 1, 2023, taxpayers should refrain from reporting to the IRS or paying the tax. Meanwhile, taxpayers should collect the necessary information and set aside the funds to be in a position to report and pay the tax once regulations are finalized.

Conclusion

The Proposed Regulations offer helpful and unsurprising guidance in many respects. However, with respect to the funding rules, the Proposed Regulations have introduced additional uncertainties for taxpayers. Taxpayers affected by these rules should be aware of the various issues and be prepared to take supportable positions.

ENDNOTES

* Grant thanks Joshua S. Tompkins for this thoughtful review of this article. Joshua S. Tompkins is a Managing Director in the Financial Institutions and Products Group of the Washington National Tax Practice of KPMG LLP. Joshua S. Tompkins is also the Co-Editor-in-Chief of the JOURNAL.

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1 Unless otherwise indicated, Code Sec. references are to the Internal Revenue Code of 1986, as amended (the "Code") and Reg. § references are to the applicable regulations promulgated pursuant to the Code (the "regulations").

2 89 FR 25829 (Apr. 12, 2024); 89 FR 25980 (Apr. 12, 2024).

3 For further discussion of the Proposed Regulations, *see* KPMG report: Initial analysis of stock repurchase excise tax proposed regulations (Apr. 17, 2024) (referred to herein as the "KPMG Report").

4 IRB 2023-3, 374 (December 27, 2022).

5 For further discussion of the ET Notice, *see* Joshua S. Tompkins and Grant Dalbey, *Current Events Roundup: Stock Buyback Excise Tax, Corporate AMT, and Digital Asset Guidance*, 19, 4 J. TAX'N FIN. PRODS. (2023) (referred to herein as the "ET Notice Article").

Additionally, on June 29, 2023 the IRS released Announcement 2023-18, IRB 2023-20, 366, which stated (*inter alia*) that, before the time specified in forthcoming regulations, taxpayers (i) are not required to report or to pay the stock repurchase excise tax and (ii) will not be subject to penalties for failure to file or pay the excise tax.

6 Proposed Reg. §58.4501-1(b)(29)(i).

7 Proposed Reg. §58.4501-1(b)(29)(22). The authority for this rule seems to be in Code Sec. 4501(f)(2), which authorizes Treasury to issue regulations and other guidance necessary or appropriate to carry out, and to prevent the avoidance of, the purpose of the excise tax, including guidance "to address special classes of stock and preferred stock."

8 Proposed Reg. §58.4501-1(b)(29)(ii). Additional tier 1 capital is defined by cross-reference to 12 CFR 3.20(c), 217.20(b), and 324.20(c). Common equity tier 1 capital is defined by cross-reference to 12 CFR 3.20(b), 217.20(b), or 324.20(b).

9 For further discussion, *see* Letter from American Bankers Association, to the Internal Revenue Service (Mar. 3, 2023) (published by TAX NOTES, *Group Addresses Effects of Stock Buyback Tax on Banking Industry*, 2023 TNTF 44-19 (Mar. 7, 2023).

10 For further discussion, *see* the Preamble to the Proposed Regulations at 89 FR 25980, 25984–25985 (Apr. 12, 2024).

11 89 FR 25980, 25984 (Apr. 12, 2024).

12 *Id.*

13 *Id.*

14 *Id.*

15 *See* Proposed Reg. §§58.4501-2(h)(1), 58.4501-4(e)(1), and 58.4501-5(b)(26) and (28). *See also* 89 FR 25980, 25985–25986 (Apr. 12, 2024).

16 Proposed Reg. §§58.4501-2(e)(5)(v) and 58.4501-4(f)(12).

17 A deep-in-the-money option is generally an option where exercise of the option on its date of issuance would result in the holder realizing significant profit.

The preamble also talks about how certain forward contracts could also be considered Tax Only Stock subject to these rules. *See* 89 FR 25980, 25990 (Apr. 12, 2024).

18 *See* 89 FR 25980, 26011 (Apr. 12, 2024).

19 Proposed Reg. §58.4501-4(f)(13).

20 Proposed Reg. §§58.4501-2(e)(5)(v) (stating that the cash settlement of an instrument in the legal form of an option contract or other derivative financial instrument that is treated as stock for federal tax purposes at the time of issuance is treated as a repurchase of that instrument, and therefore a repurchase by the covered corporation).

21 89 FR 25980, 25987 (Apr. 12, 2024).

22 *See* Proposed Reg. §§58.4501-2(h) and 58.4501-4(e).

23 Proposed Reg. §§58.4501-2(g) and 58.4501-4(d).

24 Proposed Reg. §58.4501-2(g)(2).

25 *See* Proposed Reg. §§58.4501-2(h) and 58.4501-4(e).

26 89 FR 25980, 25988 (Apr. 12, 2024).

27 Proposed Reg. §58.4501-5(b)(15).

ASRs are discussed further in the preamble. *See* 89 FR 25980, 25990 (Apr. 12, 2024).

28 Code Sec. 4501(e)(4).

29 Proposed Reg. §§58.4501-3(e) and 58.4501-4(f)(6). No comments were received by Treasury on this matter. 89 FR 25980, 26005 (Apr. 12, 2024).

30 Proposed Reg. §58.4501-2(e)(4).

31 89 FR 25980, 26018–26019 (Apr. 12, 2024).

32 *See* 89 FR 25980, 26023–26026 (Apr. 12, 2024).

33 The term "covered purchase" means an "AFC repurchase" or an acquisition of stock of an applicable foreign corporation by a relevant entity. Proposed Reg. §58.4501-7(b)(2)(vii). The term "AFC repurchase" means solely (i) a Code Sec. 317(b) redemption with respect to stock of an applicable foreign corporation or a covered surrogate foreign corporation, as applicable, except as provided in Proposed Reg. §58.4501-7(j)(3); or (ii) a Code Sec. 4501(d) economically similar transaction described in Proposed Reg. §58.4501-7 (j)(4). The term "relevant entity" means a specified affiliate of an applicable foreign corporation that is not an applicable specified affiliate of the applicable foreign corporation. Proposed Reg. §58.4501-7(b)(2)(xiv).

34 Proposed Reg. §58.4501-7(e)(1).

35 *Id.* (emphasis added). Notably, there seems to be a technical, interpretive glitch in the new language as it is written in a circular manner. More specifically, the presumptive aspect of this rule only applies to "covered fundings" and a funding is a "covered funding" if it aligns with the fact pattern the presumptive rule is describing.

36 U.S. Dept. of the Treasury, (Apr. 9, 2024), *U.S. Department of the Treasury and IRS Release Proposed Guidance on Stock Buyback Excise Tax to Ensure Large Corporations Pay More of Their Fair Share in Taxes*, *home.treasury.gov/news/press-releases/jy2244#:~:text=WASHINGTON%20%E2%80%93%20Today%2C%20the%20U.S.%20Department,ensure%20large%20corporations%20pay%20more*.

37 Proposed Reg. §58.4501-7(e)(6). The Proposed Regulations also contain ordering rules for when there are multiple covered purchases and multiple covered fundings. Proposed Reg. §58.4501-7(e)(7).

38 Further discussion on issues associated with the funding rule can be found in the KPMG Report.

39 *See* Chandra Wallace, *Proposed Buyback Funding Rule Draws Intense Fire From All Sides*, 2024 TNTF 115-2 (Jun. 17, 2024).

40 *See* 89 FR 25829 (Apr. 12, 2024).