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July 6, 2015

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Re: **Report on the Non-Ordinary Course Distribution Rules
in Notice 2014-52**

Dear Messrs. Mazur, Koskinen and Wilkins:

I am pleased to submit the enclosed New York State Bar Association Tax Section report offering commentary and recommendations on Section 2.02 of Notice 2014-52 (the "Notice"), which describes a proposal to curb the avoidance of Sections 7874 and 367 of the Internal Revenue Code by disregarding certain "non-ordinary course distributions" made by domestic entities that are acquired by foreign corporations in inversion transactions.

The Notice generally describes forthcoming regulations under Sections 7874 and 367 that would apply to transactions in which a domestic corporation ("Domestic Target"), substantially all of the properties of which are acquired by a foreign corporation ("Foreign Acquiror"), distributes property to its shareholders that may (1) reduce the percentage of Foreign Acquiror stock held by former Domestic Target shareholders by reason of such shareholders holding stock in Domestic Target (potentially

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avoiding Foreign Acquiror being treated as a “surrogate foreign corporation” under Section 7874) and/or (2) ensure that the fair market value of Foreign Acquiror is at least equal to the fair market value of Domestic Target (avoiding the imposition of shareholder-level gain under Section 367(a)).

Under the current anti-abuse rule of Section 7874(c)(4), such a distribution would be disregarded if it were part of a plan a principal purpose of which is to avoid the purposes of Section 7874. Under the forthcoming regulations, for purposes of applying this anti-abuse rule, “non-ordinary course distributions” made by Domestic Target (or its predecessors) during the 36-month period (the “Look-Back Period”) ending on the date of Foreign Acquiror’s acquisition of substantially all of the properties of Domestic Target will be treated as part of such a tax-avoidance plan, and thus will be disregarded. The Notice broadly defines “non-ordinary course distributions” as the excess of all distributions made by Domestic Target during a taxable year with respect to the equity of Domestic Target over 110% of the average of such distributions during the 36-month period immediately preceding such taxable year.

In our report, we note that while the current statutory anti-abuse rule requires an inquiry into the principal purposes underlying a particular distribution, the Notice adopts a mechanical *per se* rule that disregards purpose and could apply to transactions that are not within the intended scope of the statutory rule. In light of this, we recommend that the breadth of the forthcoming regulations should reflect the type of rule that is adopted to avoid being over-inclusive. We also recommend that any future guidance under the Notice provide taxpayers with clear mechanical rules describing how the principles articulated by the Notice will be implemented.

Further, in our report, we request guidance that would address certain details that the Notice does not address, such as the interaction between the rules provided in the Notice and the statutory anti-abuse rule, the mechanical determination of whether a distribution is a “non-ordinary course distribution,” the operation of the predecessor rule, and the manner in which a distribution is disregarded.

Finally, we make certain specific recommendations regarding the rules to be promulgated in forthcoming regulations, including the following recommendations:

- Taxpayers should be given the opportunity to establish that a distribution was not motivated by a tax-avoidance purpose (and thus should not be disregarded) through a rebuttable presumption. If, instead, a *per se* rule is retained, the scope of the rule should be narrowed, for example, by shortening the 36-month Look-Back Period to 24 months and/or increasing the 110% threshold.
- The scope of distributions that are considered “non-ordinary course distributions” should be narrowed to exclude items such as mandatory redemptions of preferred stock pursuant to its terms, mandatory or optional redemptions of preferred stock issued for cash during the Look-Back Period, and periodic “tax distributions”

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made by Domestic Targets that are treated as partnerships to partners in respect of their tax liabilities.

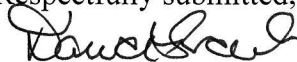
- The types of entities that are considered predecessors of Domestic Target should exclude historic targets of Domestic Target (unless any such historic target was larger (by value) than Domestic Target at the time of the relevant acquisition) and distributing and controlled corporations in tax-free-spin-offs (*i.e.*, the distributing corporation where Domestic Target is the controlled corporation and the controlled corporation where Domestic Target is the distributing corporation).
- To avoid anomalous results, the determination of whether a distribution is a “non-ordinary course distribution” should be made based on an aggregate approach that considers all distributions made by Domestic Target during the relevant periods, in lieu of a year-by-year approach.
- In order to disregard a “non-ordinary course distribution,” distributions made by Domestic Target should be “added back” to Domestic Target based on the value of such distribution on the date of such distribution.
- The determination of the number of additional shares of Domestic Target deemed outstanding in respect of a disregarded “non-ordinary course distribution” should be based on the value of Domestic Target stock on the date of the inversion transaction.
- In order to determine if and to what extent Domestic Target shareholders should be deemed to have received Foreign Acquiror stock in respect of the additional shares of Domestic Target deemed outstanding in respect of a disregarded “non-ordinary course distribution,” the rules should take into account the mix of cash and stock consideration actually paid by Foreign Acquiror in the inversion transaction. Thus, Foreign Acquiror stock should be attributed to a disregarded distribution based on the percentage of Foreign Acquiror stock that Domestic Target shareholders would have received had additional Domestic Target shares been outstanding in respect of the disregarded distribution using the exchange ratio of the actual inversion transaction.
- Promulgated guidance should specifically address the application of the rules to spin-offs, including providing examples as to how taxpayers could rebut a presumption that a spin-off is related to an inversion transaction and how a spin-off distribution is valued. Further, guidance should address whether, in a situation where Domestic Target is the controlled corporation in a spin-off, the fact that Domestic Target is a historic entity or is newly-formed has any relevance to the determination of whether pre-spin-off distributions made by Domestic Target to its corporate parent are “non-ordinary course distributions.”

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- Promulgated guidance should discuss the application of the rules to situations involving multiple classes of stock and high-vote/low-vote stock.

We very much appreciate your consideration of these recommendations and would be happy to discuss them with you or provide additional assistance.

Respectfully submitted,



David R. Sicular
Chair

Enclosure

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