



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

TAX SECTION

2017-2018 Executive Committee

MICHAEL S. FARBER

Chair
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
212/450-4704

KAREN GILBREATH SOWELL

First Vice-Chair
202/327-8747

DEBORAH L. PAUL

Second Vice-Chair
212/403-1300

ANDREW H. BRAITERMAN

Secretary
212/837-6315

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
David W. Mayo

Compliance, Practice & Procedure

Elliot Pisem
Bryan C. Skarlatos

Consolidated Returns

William Alexander
Richard M. Nugent

Corporations

Michael T. Mollerus
Gordon E. Warnke

Cross-Border Capital Markets

David M. Schizer
Andrew R. Walker

Cross-Border M&A

Yaron Z. Reich
Ansgar A. Simon

Employee Benefits

Robert C. Fleder
Jeffrey W. Ross

Estates and Trusts

Alan S. Halperin
Joseph Septimus

Financial Instruments

Lucy W. Farr
Jeffrey Maddrey

"Inbound" U.S. Activities of Foreign

Taxpayers

Peter J. Connors
Peter F. G. Schuur

Individuals

Megan L. Brackney
Steven A. Dean

Investment Funds

John C. Hart
Amanda H. Nussbaum

Multistate Taxation

Arthur R. Rosen
Jack Trachtenberg

New York City Taxes

Maria T. Jones
Irwin M. Slomka

New York State Taxes

Paul R. Comeau
Joshua E. Gewolb

"Outbound" Foreign Activities of U.S. Taxpayers

Andrew P. Solomon
Philip R. Wagman

Partnerships

Phillip Gall
Eric B. Sloan

Pass-Through Entities

James R. Brown
Edward E. Gonzalez

Real Property

Robert Cassanos
Marcy Geller

Reorganizations

Neil J. Barr
Peter A. Furci

Securitized and Structured

Finance

Daniel M. Dunn
John T. Lutz

Spin Offs

Lawrence M. Garrett
Joshua M. Holmes

Tax Exempt Entities

Stuart Rosow
Richard R. Upton

Treaties and Intergovernmental

Agreements

Lee E. Allison
David R. Hardy

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE:

Daniel Z. Altman
Pamela L. Endrey
Jason R. Factor
Kathleen L. Ferrell

Elizabeth T. Kessenides
Shane J. Kiggen
Sherry S. Kraus
William L. McRae

Joel Scharfstein
Stephen E. Shay
Eric Solomon
Linda Z. Swartz

Andrea K. Wahlquist
S. Eric Wang
Sara B. Zablotney

Report No. 1384
January 5, 2018

The Honorable David Kautter
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable David Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William M. Paul
Principal Deputy Chief Counsel and
Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: *Report No. 1384 on the Treatment of Share Repurchases under Section 355(e)*

Dear Messrs. Kautter and Paul:

I am pleased to submit the attached report of the Tax Section of the New York State Bar Association. The report addresses repurchases made by a public corporation on the open market, in an accelerated share repurchase ("ASR") program, or through a self-tender generally open to all shareholders ("Public Share Repurchases"). As described below, the report recommends that the Treasury Department and the Internal Revenue Service publish a revenue ruling providing certain counting conventions for measuring the shift in ownership for purposes of Section 355(e) of the Internal Revenue Code resulting from Public Share Repurchases.

Specifically, we make the following recommendations:

1. To the extent share repurchases by a distributing corporation or a controlled corporation are part of a plan (or series of related transactions) including a distribution otherwise qualifying under Section 355, such

FORMER CHAIRS OF SECTION:

Peter L. Faber
Alfred D. Youngwood
Gordon D. Henderson
David Sachs
J. Roger Mentz
Willard B. Taylor
Richard J. Hiegel

Herbert L. Camp
William L. Burke
Arthur A. Feder
James M. Peaslee
Peter C. Canellos
Michael L. Schler
Carolyn Joy Lee

Richard L. Reinhold
Steven C. Todrys
Harold R. Handler
Robert H. Scarborough
Robert A. Jacobs
Samuel J. Dimon
Andrew N. Berg

Lewis R. Steinberg
David P. Hariton
Kimberly S. Blanchard
Patrick C. Gallagher
David S. Miller
Erika W. Nijenhuis
Peter H. Blessing

Jodi J. Schwartz
Andrew W. Needham
Diana L. Wollman
David H. Schnabel
David R. Sicular
Stephen B. Land

repurchases will be treated as being made on a *pro rata* basis from all shareholders of the repurchasing corporation holding shares of the same class of stock, other than (a) “ten-percent shareholders” within the meaning of Treasury Regulations Section 1.355-7(h)(14) or (b) “controlling shareholders” within the meaning of Treasury Regulations Section 1.355-7(h)(3) (shareholders other than those described in clauses (a) and (b), “**Public Shareholders**”), if the following criteria are satisfied: (i) the class of shares from which the repurchases are made is widely held and listed on an established market and (ii) the repurchases are made in the open market, through an ASR program, or through a tender offer generally open to all Public Shareholders. Finally, where such repurchases are made pursuant to an agreement, understanding, or arrangement (an “**AUA**”) designed to increase or decrease the ownership percentage of any particular shareholder or group of shareholders, including holders of another class of stock, or where there is actual knowledge regarding the extent of participation by any particular shareholder or group of shareholders, including holders of another class of stock, the AUA or actual knowledge will be taken into account in measuring the shift in ownership for Section 355(e) purposes resulting from the Public Share Repurchases.

2. Any direct or indirect increase in the percentage of either voting power or value of the stock of a repurchasing corporation held by a shareholder by virtue of a Public Share Repurchase will be taken into account for purposes of Section 355(e) only after reducing such increase for any direct or indirect decrease in such percentage interest resulting from any repurchase or any disposition of stock by such shareholder or issuance of stock by the repurchasing corporation that is part of a plan (or series of related transactions) with the Section 355 distribution (*i.e.*, netting). Netting would be permitted over a defined testing period or, under an alternative approach, where either (a) two or more transactions are reasonably proximate to each other or (b) at the time of the first transaction, there is an AUA for the second transaction to occur.
3. The effect of a repurchase would be taken into account under Section 355(e) only to the extent such repurchase was otherwise treated for purposes of Section 355(e) as part of a plan (or series of related transactions) with a distribution.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this report, please feel free to contact us and we will be glad to discuss or assist in any way.

Respectfully submitted,



Michael Farber
Chair

Attachment

Hon. David Kautter
Hon. William M. Paul

January 5, 2018

cc: Dana L. Trier
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury

Thomas C. West
Tax Legislative Counsel
Department of the Treasury

Krishna Vallabhaneni
Deputy Tax Legislative Counsel
Department of the Treasury

Robert H. Wellen
Associate Chief Counsel (Corporate)
Internal Revenue Service