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June 1, 2017

The Honorable Thomas C. West
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Re: *Report No. 1370 on Temporary and Proposed Regulations Dealing with "Predecessors" and "Successors" under Section 355(e)*

Dear Messrs. West, Koskinen, and Paul:

I am pleased to submit the attached report of the Tax Section of the New York State Bar Association. The report contains comments regarding temporary and proposed regulations under section 355(e) that were published by the Treasury Department and the Internal Revenue Service on December 19, 2016, to provide guidance regarding the treatment of predecessors and successors under section 355(e) (the "**Temporary Regulations**").

Section 355(e) applies to distributions of the stock of a controlled subsidiary otherwise intended to be tax-free under section 355. Section 355(e) generally requires the distributing corporation, but not its shareholders, to recognize gain with respect to the distribution if the distribution is part of a plan (or series of related transactions) involving the acquisition of 50% or more of the stock (by vote or value) of either the distributing corporation or the controlled corporation. Section 355(e)(4)(D) states that, "any reference to a controlled corporation or a distributing

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corporation shall include a reference to any predecessor or successor of such corporation.” The Temporary Regulations, *inter alia*, provide definitions of the terms “predecessor” and “successor” for purposes of section 355(e) and establish certain rules to limit gain recognition by the distributing corporation in distributions to which the Temporary Regulations apply. The Temporary Regulations replace proposed regulations that were issued in 2004 and, subject to certain transition rules, generally apply to distributions occurring after January 18, 2017. The attached report contains our recommendations with respect to the Temporary Regulations.

Our primary recommendations are as follows:

1. While we agree that an expansion of the definition of a “predecessor” to the distributing corporation included in the prior proposed regulations is warranted, we recommend that the definition be limited to situations in which the distributing corporation and a potential predecessor corporation (or its section 381 successor) are members of the same affiliated group (determined without regard to section 1504(b)) after the distribution.
2. We also agree that it is appropriate to incorporate the “plan” concept into the definition of a “predecessor” of the distributing corporation, but we recommend that the “implicit permission” concept (used in the Temporary Regulations in determining the existence of a plan) be removed or clarified to avoid the *per se* imputation of a potential predecessor corporation’s activities to the distributing corporation.
3. We recommend that the “reflection of basis” concept (used in the Temporary Regulations in determining the existence of a “predecessor” of the distributing corporation) be clarified, and we describe several fact patterns that we believe should not implicate this concept.
4. For the reasons discussed in our 2005 report on the prior proposed regulations, we reiterate our recommendation that the approach to defining “successor” corporations in the Temporary Regulations not be expanded to apply generally any time assets of the distributing or controlled corporation are transferred with carryover basis to a corporation or partnership.
5. We recommend that the Temporary Regulations’ special gain limitation rules with respect to planned acquisitions of a 50% or greater interest in the distributing corporation (which currently apply only in the case where the acquisition occurs in a transaction described in section 381) be expanded to apply to any planned 50% acquisition of the distributing corporation.

6. We recommend that the Temporary Regulations be revised to permit an election under section 336(e) to be made with respect to a distribution to which the Temporary Regulations apply, regardless of whether the full statutory gain amount is recognized by the distributing corporation on the distribution.
7. We recommend that the narrow transition rules included in the Temporary Regulations with respect to distributions occurring after their effective date be expanded by, for example, removing the transition rules' requirement that all pre-distribution transactions be described in a binding agreement, ruling request or SEC filing before the date the Temporary Regulations were issued.

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

Respectfully submitted,



Michael Farber, Chair

The Honorable Thomas C. West
The Honorable John Koskinen
The Honorable William M. Paul

June 1, 2017

cc: Krishna Vallabhaneni
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