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Corporate Hygiene: Recent Developments Impacting Share Buybacks and Rule 10b5-1

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Agenda

- Discussion of the final SEC share repurchase disclosure amendments
- Key differences between the proposed and final share repurchase disclosure amendments
- Share repurchase reporting requirements
- Litigation challenge
- Effects on issuer stock repurchase plans
- Effects on accelerated share repurchase plans
- Rule 10b5-1 amendments
- Share repurchase excise tax
- Corporate policies relating to trading plans
- Practical considerations

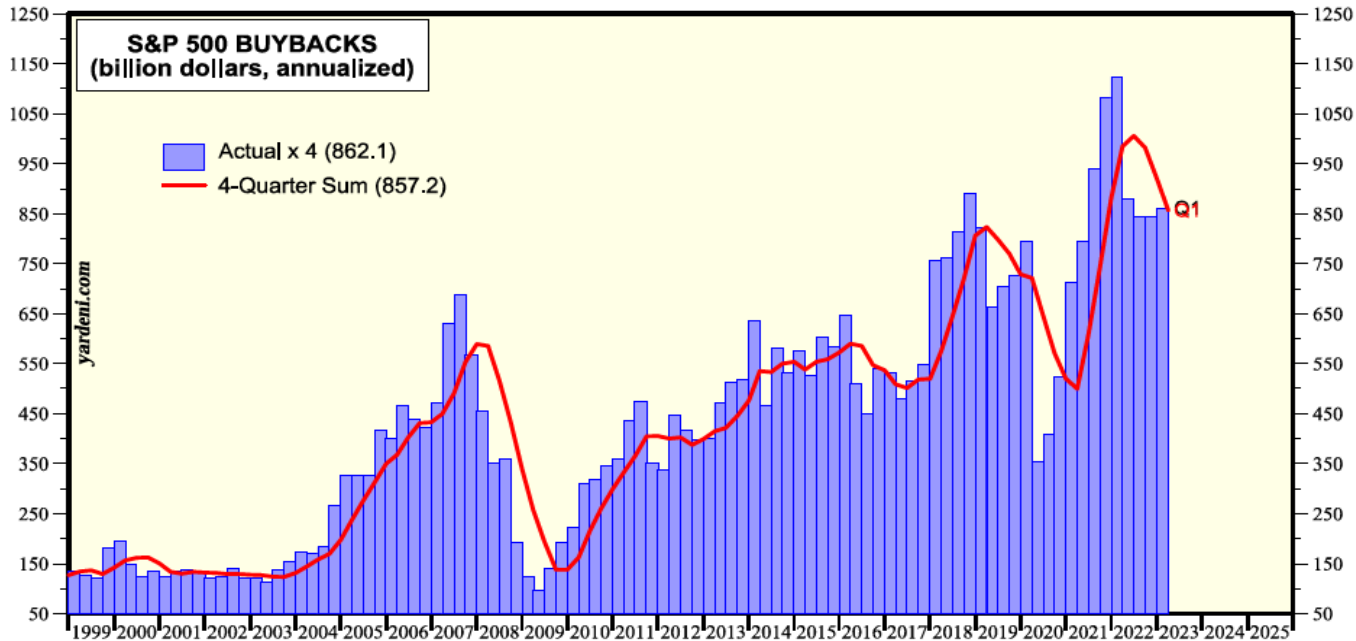


Discussion of the Final SEC Share Repurchase Disclosure Amendments

Why Implement Share Repurchase Programs?

- Increased liquidity, which should benefit shareholders
- Minimizing dilution following a stock acquisition
- A tax efficient alternative to dividends as a way to return money to shareholders
- Easier to stop and start repurchases than dividend payments
- Shares repurchased by an issuer are either canceled or kept as treasury stock, which then reduces the number of the issuer's shares outstanding, which may be beneficial to the issuer's earnings per share calculations
- Greater certainty to the issuer and affiliated purchasers in planning purchases of the issuer's common stock

S&P 500 Share Buybacks 1999 - Q1 2023



Source: Standard & Poor's.

Yardeni Research Inc., *Corporate Finance Briefing: S&P 500 Buybacks & Dividends*, July 31, 2023

Making Headlines

- High levels of buyback activity has attracted legislative, regulatory, academic and media attention
- Criticism of share repurchases in some academic and political circles
- Various Congressional proposals to limit buybacks and recently enacted excise tax

Share Repurchases

- The adopting release cites the high dollar volume of repurchases—roughly \$950 billion annually through December 2022
- The adopting release also acknowledges, drawing from a 2020 SEC study, that repurchases provide “an avenue for returning capital to investors” and notes other advantages compared to dividends, including:
 - Potential tax advantages for some investors
 - Greater perceived flexibility of repurchases versus dividends
 - Potential to provide liquidity or price support when an issuer faces downward price pressure on its stock
- But, ultimately, the adopting release continues to express the view that repurchases “may be at least partially motivated by factors other than long-term value maximization”

Background of Share Repurchase Disclosure Amendments

- SEC proposed share repurchase disclosure modernization in December 2021
- Comment period initially closed April 2022
- Comment period reopened twice
 - Due to a technological error, some comments submitted through the internet were not received by the SEC
 - In connection with Staff report on economic effects of new excise tax on buybacks
 - Adopting release notes over 170 unique comment letters were received
- Final amendments adopted May 3, 2023
 - 3-to-2 vote
- Share repurchase disclosure modernization distinct but related to SEC's Rule 10b5-1 and related insider trading disclosures rulemaking

Companies Covered

- Disclosures apply to issuers repurchasing equity securities registered under Section 12 of the Exchange Act
 - Smaller reporting companies
 - Emerging growth companies
 - Foreign private issuers
 - Exchange traded closed-end investment management companies
- Footnote clarified that the new repurchase disclosure requirements do not apply to Canadian issuers that file using the Multijurisdictional Disclosure System

Key Takeaways

- Daily tabular buyback disclosure will be required on quarterly or semiannually basis
- No materiality threshold
- Extensive narrative disclosure
- Disclosures required in structured, machine-readable data language in Inline XBRL
- Adopting release asserts the amendments “will provide investors with enhanced information to assess the purposes and effects of repurchases, including whether those repurchases may have been taken for reasons that may not increase an issuer’s value”
- Dissenting Commissioner Peirce argues the rule is “flawed in its granularity” and that daily repurchase information will “bury [investors] in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking”



Key Differences between the Proposed Amendments and the Final Amendments

Key Differences

- Proposal required daily share repurchase disclosures to be made within one business day after execution
 - Daily information is still required but not with the same frequency (now quarterly)
 - Other than addressing concerns from commenters regarding timeliness of filings, does this address any of the commenter concerns regarding sharing of pricing information, revealing timing that may provide insights regarding merger or other sensitive discussions, information overload for investors, etc.?
 - Accommodations for foreign private issuers and closed end funds
 - But, no exceptions for any issuers (no SRC or EGC relaxation of rules)
- Same basic details regarding the repurchases are required as were first proposed

Key Differences *(cont'd)*

- Repurchase data will now be filed rather than furnished
 - SEC reasons that now issuers will have more time to verify the information
 - Therefore, issuers should be subject to Exchange Act Section 18 liability
 - Information also will be deemed incorporated by reference into Securities Act filings, so will be subject to Securities Act Section 11 liability
- Manner which an issuer must disclose shares repurchased pursuant to a plan intended to satisfy Rule 10b5-1(c) and Rule 10b-18 is different than the proposal
- Checklist requirement for director and officer transactions in shares that are the subject of a repurchase plan is different—now, an issuer must check the box if the triggering trades occurred within four business days (before/after) the repurchase announcement
- Some revisions to the narrative disclosures in Item 703, Form 20-F, and Form N-CSR regarding the issuer's rationale and the issuer's policies and procedures



Reporting Requirements for Share Repurchases

Forms for Daily Buyback Disclosure

- Forms and timing for daily tabular buyback disclosure vary by type of issuer
- Issuers filing on domestic SEC forms must provide day-by-day buyback disclosure quarterly on new Exhibit 26 to Forms 10-K and 10-Q
- FPIs reporting on FPI forms must provide day-by-day buyback disclosure quarterly on new Form F-SR
 - If home country disclosures furnished on a Form 6-K satisfy the Form F-SR requirements, FPI can incorporate by reference its Form 6-K disclosures
- Listed Closed-End Funds must provide day-by-day buyback disclosure annually and semi-annually on Form N-SCR

C&DIs on Form F-SR

- On August 30, 2023, the SEC issued three C&DIs on Form F-SR:
 - C&DI 113.01 specified that Form F-SR does NOT need to be filed if during the covered fiscal quarter the FPI or affiliated purchaser did not repurchase any of its equity securities that are registered under Section 12 of the Securities Exchange Act of 1934.
 - C&DI 113.02 provided that if the FPI or affiliated issuer does not have any buybacks that would trigger a Form F-SR for a quarter, the FPI does NOT need to file a Form F-SR for that quarter solely to check the box for purchases or sales of securities by a director or member of senior management.
 - C&DI 113.03 stated that if an FPI or affiliated purchaser engaged in a buyback during its fourth quarter, the FPI must file a Form F-SR within 45 days after the end of the quarter; it CANNOT wait until the Form 20-F to report those buybacks.

Issuer Purchases of Equity Securities

Use the checkbox to indicate if any officer or director reporting pursuant to Section 16(a) of the Exchange Act (15 U.S.C. 78p(a)), or for foreign private issuers as defined by Rule 3b-4(c) (§ 240.3b-4(c) of this chapter), any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F (§ 249.220f of this chapter), purchased or sold shares or other units of the class of the issuer's equity securities that are registered pursuant to section 12 of the Exchange Act and subject of a publicly announced plan or program within four (4) business days before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price Paid per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
Total								

Old Item 703(a) Chart

Issuer Purchases of Equity Securities

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share (or unit)	(c) Total number of shares (or units) purchased as part of publicly announced plans or programs	(d) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #1 (identify beginning and ending dates)				
Month #2 (identify beginning and ending dates)				
Month #3 (identify beginning and ending dates)				
Total				

Required Detail for Tabular Disclosure

- Date of the repurchase
- Class of shares purchased
- Total number of shares purchased, whether or not made pursuant to publicly announced plans or programs
- Average price paid per share
- Total number of shares purchased as part of a publicly announced repurchase program
- Aggregate maximum number (or approximate dollar value) of shares that may yet be purchased under the publicly announced repurchase programs

Required Detail for Tabular Disclosure *(cont'd)*

- Total number of shares repurchased by the issuer in open-market transactions
 - Excluding tender offers and issuer put options
- Total number of shares purchased that are intended by the issuer to qualify for the Rule 10b-18 safe harbor
- Total number of shares purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)
- Footnote the date of adoption or termination of any plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for such buybacks identified in the table

Item 408(d) Disclosure

- Disclose whether, during last fiscal quarter (fourth fiscal quarter in the case of an annual report), the company adopted or terminated any Rule 10b5-1 trading arrangement
 - Form 10-Q and Form 10-K
- Describe material terms of the Rule 10b5-1 trading arrangement (other than price), such as:
 - Date of adoption or termination of Rule 10b5-1 trading arrangement
 - Duration of Rule 10b5-1 trading arrangement
 - Aggregate number of securities to be purchased or sold pursuant to the Rule 10b5-1 trading arrangement

Amendments to Item 703

- Narrative information relating to the repurchases in the tabular disclosure, including:
 - Objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases
 - Number of shares purchased other than through a publicly announced plan or program, and the nature of the transaction
 - Whether the purchases were made in open-market transactions, tender offers, in satisfaction of the obligations upon exercise of outstanding put options issued by company, or other transactions
 - Date each publicly announced repurchase program announced
 - Dollar amount approved for each publicly announced repurchase program
 - Expiration date of each publicly announced repurchase program

Amendments to Item 703 *(cont'd)*

- Narrative information relating to the repurchases in the tabular disclosure, including:
 - Each publicly announced program that has expired during the period covered by tabular disclosure
 - Date each publicly announced program expired
 - Each publicly announced program the company determined to terminate prior to expiration, or under which the company does not intend to make further purchases
- Any policies and procedures relating to purchases and sales of the company securities by officers and directors during a repurchase program
 - Include any restrictions on such transactions
- Forms 10-Q and 10-K with corresponding disclosure in Forms 20-F and N-CSR

Inline XBRL

- Disclosures pursuant to Items 408(d), 601 and 703 of Regulation S-K, Item 16E of Form 20-F, Item 14 of Form N-CSR, and Form F-SR must be tagged in Inline XBRL
 - XBRL (eXtensible Business Reporting Language) is a structured, machine-readable data language
- Detail tagging of the quantitative amounts disclosed in the required tabular disclosures
- Block text tagging and detail tagging of required narrative and quantitative information

Compliance Dates

- Compliance date for issuers reporting on Forms 10-Q and 10-K
 - The first filing covering the first full fiscal quarter that begins on or after October 1, 2023
- Compliance date for FPIs reporting on forms 20-F and 6-K
 - New Form F-SR Form F-SR covering the first full fiscal quarter that begins on or after April 1, 2024
 - Related Form 20-F narrative disclosure in first Form 20-F filed after the FPI's first Form F-SR has been filed
- Compliance date for Listed Closed-End Forms
 - Form N-CSR covering the first six-month period that begins on or after January 1, 2024



Litigation Challenge

Chamber of Commerce

- Business groups led by the US Chamber of Commerce, with the Texas Association of Business and LongView Chamber of Commerce, filed suit in the US Court of Appeals, Fifth Circuit, to stop the SEC from implementing the rule
- The Chamber of Commerce has raised issues (common to other challenges of SEC rules) including the following:
 - SEC's cost-benefit analysis was insufficient
 - Analysis should be redone to reflect the new excise tax on buybacks
 - Need opportunity for public comment on such new analysis before rule finalized
- Chamber of Commerce raised constitutional defect:
 - Disclosure requirement for the rationale or objective of a buyback program contravenes the First Amendment
 - At minimum, disclosure rules must be adequately tailored and reduce instances of compelled speech where possible
- State amici have raised different arguments: objecting to federalization of corporate law

SEC response

- The SEC has responded to the Chamber's arguments
 - The rule, it says, would not require companies to state opinions; the "reasons" for engaging in a buyback are not ideological
 - There is a legitimate state interest and no undue burden on speech
 - The SEC states it considered the impact of the excise tax, as well as all other impacts (defended by amicus)



Effects on Issuer Stock Repurchase Plans

Effects on Stock Repurchase Plans

- Commenters raised concerns that the volume of information that will become available regarding repurchases may have a chilling effect on issuer repurchases
- For example, investors may place undue focus on whether the issuer chose to (or chose not to) rely on Rule 10b-18 or Rule 10b5-1
 - The adopting release notes that information regarding the timing of issuer trading arrangement adoptions and terminations “is expected to provide additional insight”
- Sharing of information that is potentially competitively sensitive or that may reveal information regarding the timing of M&A or other strategic discussions
- Negative inferences relating to purchases and sales by insiders in proximity to issuer repurchases
- Is this all likely to lead to more enforcement activity in relation to an issuer’s disclosure controls and procedures? The use of MNPI? Transactions by insiders?



Effects on Accelerated Share Repurchase Plans

Accelerated Share Repurchase Plans

- An accelerated share repurchase, or ASR, is a structured, privately negotiated transaction, usually documented as a “forward” contract, in which a dealer agrees to sell a pre-defined amount of stock to a company at a price per share that is based on the VWAP during the relevant period
- A dealer acts as the “seller” of company shares in an ASR, and the company acts as the “purchaser” in buying back its own shares
- Numerous dealers engage in ASRs with their corporate clients
- Although ASRs are now commoditized to a significant extent, they do entail legal considerations that require review by counsel

Accelerated Share Repurchase Plans *(cont'd)*

- **At the beginning of the ASR:**
 - The company pays a pre-defined dollar amount to the dealer
 - The dealer borrows stock from current holders of the equity (stock lenders)
 - The dealer delivers these shares to the company (typically 80% of the underlying shares)
- **Over time:**
 - The dealer buys stock in the market to cover the shares it borrowed
 - The dealer typically has the option to complete the ASR at any time during a pre-agreed period
 - This option and its associated option value generates a discounted repurchase price for the company
- **At final settlement:**
 - The total number of shares purchased by the company equals the ASR dollar size divided by the discounted average price
 - If the dealer did not deliver enough stock upfront, it delivers incremental shares to the company at the end of the ASR
 - If the dealer delivered too many shares, the company will owe the dealer (and can typically settle in cash or in shares)

Accelerated Share Repurchase Plans *(cont'd)*

- Though 10b-18 does not directly apply to derivatives transactions, most market participants nonetheless rely on 10b-18 by analogy
- SEC Division of Market Regulation: Answers to Frequently Asked Questions Concerning Rule 10b-18 (as modified, November 17, 2004)
 - *Question 13:* Is the Rule 10b-18 safe harbor available for an issuer and the broker-dealer who engage in an accelerated share repurchase plan or use a forward contract to repurchase the issuer's stock?
 - *Answer:* Accelerated share repurchase plans and forward contracts are private (off-market) transactions. Therefore, they are not eligible for the Rule 10b-18 safe harbor, which applies only to open market purchases. Moreover, the Rule 10b-18 safe harbor also is not available for the broker's covering transactions, as these transactions are not agency or riskless principal trades effected on behalf of the issuer.

Accelerated Share Repurchase Plans *(cont'd)*

- Despite the safe harbor not being available, an ASR typically provides that the dealer will implement the repurchase program according to the company's instructions and in accordance with the requirements of Rule 10b-18
- This is particularly applicable during a period when a dealer is engaging in more than ordinary daily buy-in activity, such as
 - When establishing its initial delta hedge for a collared transaction, or
 - Buying-in additional settlement shares after the averaging period is over
- This supports the view that the activities related to the transaction should not raise manipulation concerns under the Exchange Act
- Agreements may incorporate Rule 10b-18 provisions in setting out the mechanics of the transaction, including with respect to mechanics of the buy-in of the stock and the pricing of the stock to be sold by the dealer to the company

Accelerated Share Repurchase Plans *(cont'd)*

- An issuer also may rely on 10b5-1 for itself
 - Issuer should represent that it is not in possession of material nonpublic information when entering into the ASR
 - ASR will not permit the issuer to influence the bank's purchases or to share material nonpublic information with the dealer
 - Issuer will not be able to change terms, except when it can represent that it is not in possession of MNPI
 - Program may establish black-outs (most arrangements then extend the term of the ASR for each black-out day)
- If a transaction gives an issuer any option (such as whether to make cash or physical settlement), the issuer may be required to repeat its representation that it does not possess MNPI if it makes such election

Accelerated Share Repurchase Plans *(cont'd)*

- The proposed rule's daily disclosure requirements would have been quite problematic as it related to ASRs; it is fair to assume, in the absence of guidance to the contrary, that with an ASR, an issuer would report the repurchase as effected on the execution date
- For an ASR, an issuer may want to add additional narrative disclosure in order to provide some context for the transaction and the terms
- The final rule asks whether the issuer intends to rely on the 10b5-1(c)(1) affirmative defense and Rule 10b-18—as discussed earlier, while the repurchase safe harbor is not strictly available, issuers may want to consider disclosure relating to intended reliance
- An issuer also may consider adding additional narrative discussion relating to the choice of repurchase methodology (an ASR versus an open market repurchase)

Rule 10b5-1 Amendments

Brief Description of Conditions Impacting Individuals

- Cooling-off periods
 - For directors and executive officers, the later of 90 days and 2 business days after filing of Form 10-Q or Form 10-K (maximum of 120 days)
 - 30 days for others
- Prohibition on overlapping plans, with limited exceptions
- Single-trade plans limited to one during any 12-month period
- None of the above conditions apply to the Issuer

Quarterly 408(a) Disclosures for Director and Officer Adoptions of Trading Arrangements

- Issuers must disclose in Form 10-Q (and Form 10-K for the 4th quarter) whether any director or executive officer has **adopted** or **terminated** any:
 - Rule 10b5-1 trading arrangement, or
 - Non-Rule 10b5-1 trading arrangement
- Disclosure must include name, title, date of adoption or termination, duration and number of securities
- Disclosure provided in inline XBRL
- Questions regarding breadth of non-Rule 10b5-1 trading arrangement definition

Annual 402(x) Disclosures re Awards of Option Grants 4 Business Days Before and One Business Day after Disclosure of MNPI

- Tabular disclosure of option awards, on an award-by-award basis, granted to NEOs in the period beginning (i) four business days before the filing of a periodic report (10-Q or 10-K), or current report on Form 8-K that contains MNPI (other than an 8-K disclosing the grant); and (ii) ending one business day after filing such report:
 - Date of grant, number of securities granted, exercise price and fair value at grant date
 - Percentage change in closing price of underlying stock between the trading days prior to and following disclosure

Name	Grant date	Number of securities underlying the award	Exercise price of the award (\$/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
PFO					
PFO					
A					
B					
C					

Annual 402(x) Disclosures *(cont'd)*

- Disclose issuer policies and procedures on timing of option awards, including:
 - How the board determines when to grant options;
 - Whether and, if so, how MNPI is taken into account;
 - Whether the issuer has timed disclosures of MNPI for purpose of affecting value of executive compensation
- Options include SARs and similar instruments with option-like features

Annual 408(b) Disclosure re Insider Trading Policies

- Issuers must disclose whether they have adopted insider trading policies and procedures for directors, officers and employees, **or the registrant itself**, that are reasonably designed to promote compliance with insider trading laws
- If issuer has not adopted such policies and procedures, it must explain why it has not done so
- Must file such policies and procedures as an exhibit to Form 10-K
- Disclosure must be provided in inline XBRL
- Similar annual disclosure requirement for foreign private issuers pursuant to new Item 16J

Associated Disclosure Controls

- Consider adequacy of pre-clearance policy for directors and executive officers to identify adoption or termination of trading plans for quarterly disclosures
- Annual disclosure of option awards made in proximity to filing reports with material information is likely to be infrequent; can't rely on marking-up prior year's proxy statement

Compliance Dates

- Item 408 and Item 402(x) disclosure:
 - Disclosure and Inline XBRL tagging requirements become effective beginning with filings covering the first full fiscal period beginning on or after April 1, 2023
 - Smaller reporting companies have an additional six-months for transition, with compliance required covering the first full fiscal period beginning on or after October 1, 2023

Share Repurchase Excise Tax

Share Repurchase Excise Tax

- The Inflation Reduction Act of 2022, Public Law No: 117-169 (the “IRA”) was enacted into law on August 16, 2022
- Among other provisions, the IRA included a 1% tax on certain stock buybacks as new Code section 4501
- On the agenda:
 - General application of the stock buyback excise tax
 - Statutory exceptions
 - Notice 2023-2
 - IRS Announcement 2023-18
 - Application to SPACs

General Application under the Legislation

- Non-deductible 1% tax on the value of stock of a “covered corporation” that is either repurchased by the corporation or acquired by its affiliates during a taxable year
- A “covered corporation” is a domestic corporation that is traded on an established securities market, including a non-US company treated as a domestic corporation for US federal income tax purposes
- In limited cases, acquisitions of stock of a public non-US entity by a domestic affiliate (that is more than 50% owned by the non-US entity) could be captured
- Applies to buybacks beginning in 2023 – no grandfather rule
- Applies to any buyback that is a redemption under section 317(b) the Code, which is fairly broadly defined to include any acquisition in exchange for cash or property (other than the corporation’s own stock or stock rights)
 - Also applies to any transaction that is determined by the Secretary to be “economically similar” to a redemption under section 317(b) of the Code

Statutory Exceptions

- Headliner: excise tax applies only to the fair market value of the net stock repurchased, which is the fair market value of repurchased stock minus the fair market value of stock issued *during the same tax year*.
- Other exceptions:
 - Where the fair market value of a covered corporation's stock buybacks for a year do not exceed \$1 million
 - Buybacks that are part of a tax-free reorganization
 - Repurchases by REITs and RICs
 - Redemptions treated as dividends for US tax purposes
 - Where repurchased stock is contributed to an employee benefit plan

Notice 2023-2

- Released December 2022 and provides interim guidance on the application of the excise tax and announces the IRS intends to issue proposed regulations (generally consistent with the Notice)
- Importantly, generally excludes distributions in complete liquidation under section 331 or section 332 of the Code from the definition of a transaction that is “economically similar” to a redemption under section 317(b) of the Code
- Provides a list of transactions that are “economically similar,” including certain reorganization, recapitalization transactions and complete liquidations that are “overlap” transactions
- The Notice also provides technical clarification on a number of aspects of the excise tax, including the timing and valuation of repurchased stock, the application of the netting rule to employee compensation plans, and reporting for the excise tax
- Taxpayers may rely on the Notice until proposed regulations arrive

IRS Announcement 2023-18

- Released this summer and generally confirms that reporting and payments aren't required before the time specified in the upcoming regs
- For taxpayers with a taxable year ending after December 31, 2022, but prior to publication of the forthcoming regulations, such regulations are expected to provide that any liability for the stock repurchase excise tax for such taxable year will be reported on the Form 720 (Quarterly Federal Excise Tax Return) that is due for the first full quarter after the date of publication of the forthcoming regulations, and that the deadline for payment of the stock repurchase excise tax is the same as the filing deadline
- Mentions no penalties for failure to pay before the time specified in the forthcoming regulations
- Also mentions that the forthcoming regulations will require covered corporations to keep complete and detailed records to establish accurately any amount of stock repurchases potentially covered and to retain these records as long as their contents may become material

Application to SPACs

- The legislation contained no special exception for SPACs, which have redemption rights built in at the outset, whether upon target acquisition or if the SPAC does not find a target
- Winding up a SPAC that found no target is generally not subject to the excise tax -- the Notice is clear that complete liquidations are generally not subject to the excise tax (unless there is an "overlap" liquidation)
- Redemption of shareholders as part of a de-SPAC transaction likely to be subject to the excise tax
- The amount of these redemptions subject to the excise tax may be reduced by the issuance of PIPE shares under the netting rule
 - What if SPAC is not the entity issuing the PIPE shares?
- If a SPAC redeems shareholders prior to a de-SPAC transaction that does not close and the SPAC liquidates in the same taxable year, the redemptions in connection with the de-SPAC may not be subject to the excise tax



Corporate Policies Relating to Trading Plans

Corporate Policies

- The final amendments require narrative discussion regarding the objectives or rationale for each repurchase plan or program
- From the perspective of the adopting release and the issues highlighted in both the proposing and the adopting release, the SEC appears to be focused, among other things, on the following:
 - An explanation of why the issuer undertook a repurchase, rather than, say, a dividend
 - The particular objectives of, or the perceived benefits of, the repurchase: for example, is the repurchase intended to offset or mitigate the dilutive effect of the issuance of a convert, or of a stock acquisition, or of stock-based compensation issuances? Or does the issuer believe the stock to be undervalued?

Corporate Policies *(cont'd)*

- In constructing a policy regarding repurchases, an issuer may want to take into account alternative uses of cash and articulate general parameters that will inform decisions regarding returns to shareholders, timing of repurchases, amounts to be repurchased, pricing
 - In the adopting release, the SEC discusses narrative disclosure that addresses “other possible ways to use the funds allocated for the repurchase and comparing the repurchase with other investment opportunities that would ordinarily be considered by the issuer, such as capital expenditures and other uses of capital. Issuers could also discuss the expected impact of the repurchases on the value of the remaining shares.”
- The adopting release, like the proposing release, also focuses on the potential nexus, if any, between repurchases and compensation; boards may want to evaluate any accounting or EPS metrics and compensation metrics that may be affected

Corporate Policies *(cont'd)*

- Will the issuer seek to rely on Rule 10b5-1 and Rule 10b-18 in the context of repurchases?
- Issuers will want to consider more detailed and rigorous internal compliance policies in order to address both Rule 10b5-1 and Rule 10b-18
- Issuers also must disclose whether they address in their insider trading plans or in their codes of ethics, or otherwise, any policies relating to purchases and sales of securities by officers and directors during issuer repurchase programs
 - Consider the interplay with the recent amendments to Rule 10b5-1
 - As we will discuss later, issuers will need to implement disclosure controls and procedures in order to address this



Practical Considerations

Disclosure Controls and Procedures

- Process in place to gather and maintain buyback information to be presented in the required tabular daily buyback disclosure
 - Useful to prepare this buyback information throughout the particular quarter to allow time for the report to be accurately gathered from brokers and then compiled and checked
- Process to assess the narrative buyback disclosure, keeping in mind that objectives and rationales may change from filing to filing based on circumstances impacting the period
- Process in place to track director and officer trades within 4 business days before or after the announcement of a share repurchase program or increase

Potential Changes to Consider

- Continued reliance on Rule 10b5-1(c) and Rule 10b-18
 - Assess decisions with respect to reliance on the affirmative defense and/or the safe harbor
 - Potential for greater scrutiny of buyback decisions
- Documentation of buyback decisions and processes
 - Consider language in resolutions and minutes
 - Any formal advice from financial intermediaries
- Adding restrictions to insider trading policies

Objectives, Rationales and Process

- Begin planning for disclosures regarding objectives, rationales and processes for share repurchases
- Consider what impact these disclosures may have on investors, research analysts and others
- Assess consistency of buybacks with disclosed objective/rationale
 - Determine when disclosure should be changes
- Useful for companies to draft sample language well in advance
 - Seek input from their investor and/or public relations departments, finance department, law department, outside counsel, senior management and directors

Avoiding Boilerplate Disclosures

- Objectives, rationales and processes must be tailored to the specific company
- Suggestions for avoiding boilerplate disclosure may include:
 - Discussion of other possible ways for the issuer to use the funds allocated for buyback
 - Comparison of buyback to other investment opportunities
 - Discussion of impact on remaining shares
 - Discussion of factors driving repurchase
 - Discussion of source of funding where material

Sample (But NOT Form) Objectives and Rationale Disclosure

The company's board of directors, in accordance with its fiduciary duties under state corporation law, considers share buybacks to be one of several valuable ways our company can deploy capital. The first way is to reinvest in existing businesses, from employee training and customer support to repaying lenders. An alternative is to acquire new businesses. After considering these deployments, next is either to repurchase shares if they can be acquired cheaply or, if not, pay a dividend. We may undertake share buybacks when we lack better ways to deploy capital and our shares are priced below value. Since 2023, we also take into account the excise taxes imposed on share buybacks and other administrative costs. In addition, to assure that selling shareholders are not disadvantaged by selling at a discount, we comply with all of our disclosure obligations designed to enable shareholders to make a reasonable estimate of share value in deciding whether to sell. We believe that our share buyback policy is in the best interests of our corporation and its shareholders and is also consistent with the interests of our other stakeholders.

Additional Practical Considerations

- Shares withheld to satisfy tax withholding on exercise or vesting of equity awards
- In addition to required disclosures, consider whether any other information is material to buyback discussion
- FPIs should prepare for new Form F-SR quarterly requirement and assess interrelationship with home country requirements
- The required SEC disclosures are in addition to stock exchange requirements to promptly disclose material news
- Consider the buyback disclosure requirements in the wider context of the recent Rule 10b5-1 and insider trading disclosures amendments

Panelists



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- As co-leader of Mayer Brown's Capital Markets Practice, Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including IPOs and other public offerings and private placements of equity and debt securities.
- She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including tech, telecommunications, healthcare, financial institutions, REITs and consumer and specialty finance.



David Schuette

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- David Schuette focuses on securities and corporate work. He represents underwriters, issuers and selling stockholders in various types of equity offerings, including common stock, ADRs and limited partnership units, and various types of debt offerings, including mortgage bonds, convertible debt, investment grade and high-yield debt, as well as equipment trust pass-through certificates.
- David also represents issuers and investment banks in connection with liability management transactions, including exchange offers, tender offers and consent solicitations. In addition to his transactional work, he regularly advises public companies in a variety of industries on SEC compliance matters and corporate governance issues.



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- Laura Richman is a counsel in Mayer Brown's Corporate & Securities practice. She has a wide-ranging corporate and securities practice, with a strong focus on corporate governance issues and public disclosure obligations.
- Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly and current reports. Laura regularly counsels clients on ongoing SEC rulemaking impacting public companies, including with respect to climate change, cybersecurity, human capital management and board diversity.
- Laura has practiced with Mayer Brown since 1981.



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- Brennan Young is an associate in Mayer Brown's Charlotte office and a member of the Tax Transactions & Consulting practice.
- He has a broad-based transaction-oriented US federal income tax practice focused on structuring and negotiating the tax aspects of domestic and international mergers, acquisitions, reorganizations, and securities offerings including debt, equity offerings and structured products.

Supplemental Materials

Read more:

- [SEC Adopts New Share Repurchase Disclosure Rules](#)
- [1% Stock Buyback Tax: US Treasury, IRS Release Interim Guidance](#)
- [SEC Adopts Amendments to Rule 10b5-1's Affirmative Defense to Insider Trading Liability & Related Disclosures](#)
- [Top 10 Practice Tips: Stock Repurchase Programs](#)
- [What's the Deal? – Stock Repurchase Programs: Useful Reminders](#)
- [MB Microtalk: Recent Share Repurchase Disclosure Modernization Amendments](#)
- [MB Microtalk: Excise Tax](#)



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