

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 232, 240, 249, and 274

[Release Nos. 34-96458; IC-34768; File No. S7-21-21]

RIN 3235-AM94

Reopening of Comment Period for Share Repurchase Disclosure Modernization

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission (“Commission”) is reopening the comment period for its proposal, *Share Repurchase Disclosure Modernization*, Exchange Act Release No. 34-93783 (Dec. 15, 2021) (“Proposing Release”). The Commission proposed amendments to modernize and improve disclosure about repurchases of an issuer’s equity securities that are registered under the Securities Exchange Act of 1934. Specifically, the proposed amendments would require an issuer to provide more timely disclosure on a new Form SR regarding purchases of its equity securities for each day that it, or an affiliated purchaser, makes a share repurchase. The proposed amendments would also enhance the existing periodic disclosure requirements about these purchases. The Commission subsequently reopened the comment period for the Proposing Release in *Resubmission of Comments and Reopening of Comment Periods for Several Rulemaking Releases Due to a Technological Error in Receiving Certain Comments*, Exchange Act Release No. 34-96005 (Oct. 7, 2022). In addition, after the proposed amendments were published for public comment, an excise tax on share repurchases was signed into law. A staff memorandum was added to the public comment file on December 7, 2022 to analyze the impact of the new excise tax on the potential economic effects of the

proposed amendments. The Commission is reopening the comment period to allow interested persons the opportunity to analyze and comment on the additional analysis.

DATES: The comment period for the proposed amendments published February 15, 2022, at 87 FR 8443, which was initially reopened on October 7, 2022, at 87 FR 63016, is again reopened. Comments should be received on or before January 11, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (<https://www.sec.gov/how-to-submit-comments>); or

Paper comments:

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-21-21. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the “Stay Connected” option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: John Fieldsend, Special Counsel, Office of Rulemaking, at (202) 551-3460, Division of Corporation Finance; and, with respect to the application of the proposal to investment companies, Quinn Kane, Special Counsel, at (202) 551-6792, Investment Company Regulation Office, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

As described more fully in the Proposing Release, the Commission proposed changes to the requirements for disclosure of purchases of equity securities made by or on behalf of an issuer or any affiliated purchaser.¹ The proposed amendments were intended to improve the quality, relevance, and timeliness of information related to issuer share repurchases. The proposed amendments would modernize and improve the disclosure required about repurchases of an issuer’s equity securities by:

- Requiring daily repurchase disclosure on a new Form SR, which would be furnished to the Commission one business day after execution of an issuer’s share repurchase order;

¹ In the Proposing Release, the term “issuer” included affiliated purchasers and any person acting on behalf of the issuer or an affiliated purchaser. The term “affiliated purchaser” as used in Item 703 is defined in 17 CFR 10b-18(a)(3).

- Amending Item 703² of Regulation S-K,³ with corresponding changes to Item 16E of Form 20-F⁴ for foreign private issuers and Item 9 of Form N-CSR for certain registered-closed end investment management companies,⁵ to require additional detail regarding the structure of an issuer’s repurchase program and its share repurchases; and
- Requiring information disclosed pursuant to Item 703, Item 16E of Form 20-F, Item 9 of Form N-CSR, and new Form SR to be reported using a structured data language (specifically, Inline eXtensible Business Reporting Language).

After the proposed amendments were published for public comment, The Inflation Reduction Act of 2022 (“Act”) was signed into law on August 16, 2022.⁶ Section 10201 of the Act adds new section 4501 of the Internal Revenue Code of 1986 (“Internal Revenue Code”),⁷ which imposes upon “covered corporations” a non-deductible excise tax equal to one percent of the fair market value of any stock of the corporation which is repurchased by such corporation during the taxable year. Under the Act, a “covered corporation” is any domestic corporation⁸ the stock of which is traded on an “established securities market” (within the meaning of section

² 17 CFR 229.703.

³ 17 CFR 229.10 through 229.1305.

⁴ 17 CFR 249.220f.

⁵ 17 CFR 249.331 and 17 CFR 274.128.

⁶ See Pub. L. No. 117-169, 136 Stat. 1818 (2022).

⁷ See 26 U.S.C. 4501.

⁸ A domestic corporation means a corporation created or organized in the U.S. or under the law of the U.S. or of any State or the District of Columbia. See 26 U.S.C. 7701(a)(4). Section 4501(d) of the Act also applies to certain domestic subsidiaries that purchase the stock of their non-U.S. corporate parents, the shares of which are traded on an established securities market.

7704(b)(1) of the Internal Revenue Code⁹). The excise tax applies to share repurchases after December 31, 2022.¹⁰

The staff of the Division of Economic and Risk Analysis has prepared a memorandum that discusses potential economic effects of the new excise tax on the incidence and level of share repurchases,¹¹ which are a part of the market baseline for the proposed amendments. We believe that the information presented in the Staff Memorandum has the potential to be informative for evaluating the proposed amendments in light of this recently enacted legislation. We are, therefore, reopening the comment period for an additional 30 days to permit interested parties to comment on the Staff Memorandum, which has been included in the comment file. In addition to the requests for comment included in the Proposing Release, the Commission specifically seeks comments on the following:

Requests for Comment

1. Would the Act's new excise tax affect the proposed amendments' potential economic effects?¹² If so, what would the specific impact (or impacts) of the new excise tax be? How

⁹ See 26 U.S.C. 7704(b)(1). The use of "established securities market" in section 7704(b)(1) is defined in 26 CFR 1.7704-1(b). The definition includes national securities exchanges registered under Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, national securities exchanges exempt from registration because of the limited volume of transactions, certain foreign securities exchanges, regional or local exchanges, and certain interdealer quotation systems.

¹⁰ Additionally, Section 10201(e) of the Act sets forth certain exceptions to the applicability of the excise tax. Among these exceptions are repurchases that are treated as a dividend under the Internal Revenue Code and repurchases made by a real estate investment trust or by a "regulated investment company." Section 851(a) of the Internal Revenue Code generally defines "regulated investment companies" as domestic corporations that are registered under the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C. 80a-2(c), as management companies or unit investment trusts, have in effect an election under the Investment Company Act to be treated as business development companies, or are certain common trust funds or similar funds. See 26 U.S.C. 851(a).

¹¹ Memorandum of the Staff of the Division of Economic and Risk Analysis, *Supplemental Analysis of the Potential Implications of the Recently Enacted Excise Tax on Share Repurchases for the Economic Effects of Share Repurchase Disclosure Modernization Amendments* (Dec. 7, 2022) ("Staff Memorandum"), available at <https://www.sec.gov/comments/s7-21-21/s72121.htm>.

¹² See Staff Memorandum, *supra* note 11, Section II.

would the new excise tax interact with the effects of the direct and indirect costs of the proposed amendments on issuers and investors?

2. The Staff Memorandum estimates that,¹³ based on year 2020 (2021) data, of the approximately 3,300 (3,600) issuers engaged in repurchases and subject to the proposed amendments, approximately 2,000 (2,300) issuers would be affected by the excise tax. Do you agree with these estimates? If you do not agree with these estimates, please explain why. Please also provide alternative estimates and explain why you believe those alternatives would be more accurate.

3. Do you agree with the qualitative analysis in the Staff Memorandum of the likely directional effects of the new excise tax on share repurchases?¹⁴ Is there other, additional research the staff should consider? If so, please discuss this research and why you believe it is relevant to the analysis.

4. What is the likelihood, if any, given the Act's new excise tax that issuers will replace share repurchases with dividends, including special dividends?¹⁵ Is it administratively more costly to distribute a dividend, or special dividend, as a means to return cash to shareholders as compared to repurchases? If so, please discuss how the costs differ.

5. The Staff Memorandum states that issuers subject to the proposed amendments, but that are exempted from the new excise tax, would not be directly affected by the new excise tax (but they may incur indirect effects).¹⁶ Are there any additional impacts that the staff should consider? Would these issuers incur any indirect effects? For example, the Staff Memorandum

¹³ See *id.*, *supra* note 11, Section II.A.

¹⁴ See *id.*, *supra* note 11, Section II.C.

¹⁵ See *id.*, *supra* note 11.

¹⁶ See *id.*, *supra* note 11.

includes as possible indirect effects competitive spillovers of a decrease in repurchases among issuers subject to the excise tax, or changes in investor sentiment regarding repurchases in response to the decline in share repurchases among a considerable number of issuers. Would competitive spillovers or changes in investor sentiment affect share repurchase activity by issuers subject to the proposed amendments, but that are exempted from the new tax? If so, what would these impacts be? What other indirect effects would occur?

6. The Staff Memorandum states that the excise tax is not expected to change the direction of the expected economic effects of the proposed amendments with respect to any particular share repurchase that takes place, but that it may affect the total number of share repurchases that occur, and thus may affect the aggregate impact of the proposed amendments.¹⁷ Do you agree? Please provide the reasoning for your response.

7. The Staff Memorandum states that the categories of costs and benefits described in the Proposing Release would likely remain the same, but the magnitude may change as a result of the excise tax.¹⁸ Do you agree with this assessment? If not, what other costs or benefits should be considered in assessing the potential economic effects of the proposed amendments?

8. Do you agree with the conclusion in the Staff Memorandum that the general efficiency, competition, and capital formation considerations discussed in the Proposing Release are expected to continue to apply except for the potential competitive effects discussed in the Staff Memorandum?¹⁹

We request and encourage any interested person to submit comments regarding the proposed amendments, specific issues discussed in this release, the Staff Memorandum, or the

¹⁷ See *id.*, *supra* note 11, Section III.A.

¹⁸ See *id.*, *supra* note 11, Section III.B.

¹⁹ See *id.*, *supra* note 11, Section III.D.

Proposing Release, and other matters that may have an effect on the proposed amendments.

Commenters are urged to be as specific as possible; when commenting, it would be most helpful if you include the reasoning behind your position or recommendation. All comments received to date on the proposed amendments will be considered and need not be resubmitted.

By the Commission.

Dated: December 7, 2022.

J. Mathew DeLesDernier,

Deputy Secretary.