



"Inflation Reduction Act" stock buyback

Practical considerations for retirement plans and equity-based compensation arrangements

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Introduction

President Biden on August 16, 2022, signed into law H.R. 5376 (commonly called the “Inflation Reduction Act of 2022” or “IRA”).¹ The IRA introduced new section 4501 of the Internal Revenue Code, imposing a 1% excise tax on publicly traded U.S. corporations that repurchase corporate stock after December 31, 2022.² The excise tax is based on the fair market value of stock repurchased during a taxable year. The amount taken into account with respect to repurchased stock is reduced by the fair market value of any stock issued by the covered corporation during the entirety of its taxable year, including the fair market value of any stock issued or provided to employees of a covered corporation (or employees of a specified affiliate of such covered corporation), whether or not such stock is issued pursuant to the exercise of an option.³ In addition, there is an exemption for when the stock repurchased (or an amount of stock equal to the value to the repurchased stock) is contributed to an employer-sponsored retirement plan, employee stock ownership plan (ESOP), or similar plan,⁴ and another exemption where the amount of stock repurchased in a taxable year does not exceed \$1 million.⁵

Notice 2023-2 was released on December 27, 2022,⁶ providing interim guidance on the new excise tax. The guidance, among other things, addresses:

- How to determine the fair market value of corporate stock that is repurchased or issued or provided during the taxable year
- How to apply the adjustment under section 4501(c)(3) to reduce the amount of corporate stock treated as repurchased by the amount that is issued or provided to employees of a covered entity during the taxable year (the “netting rule”), including rules that apply to covered corporations with taxable years beginning before January 1, 2023, and ending after December 31, 2022
- How to apply the exception for repurchased corporate stock that is contributed to an employer-sponsored retirement plan, ESOP, or similar plan under section 4501(e) for exemption purposes
- How to treat stock withheld to cover the income tax of employees that were issued or provided corporate stock (covered corporate entities may rely on the notice when planning to repurchase corporate stock (pending issuance of further guidance)⁷

There are notable planning considerations as well as unanswered questions regarding the interplay between employer arrangements and the exemptions and/or adjustments related to the new stock buyback excise tax.

¹ Pub. L. 117-169, 136 Stat. 1818 (2022). The legislative text and summary of the bill can be found [here](#).

² 136 Stat. at 1828-1831.

³ Section 4501(c)(3).

⁴ Section 4501(e)(2).

⁵ Section 4501(e)(3).

⁶ Kindly note that repurchased corporate stock is to be reported on draft Form 7208 (Excise Tax on Repurchase of Corporate Stock) which was also released on December 27, 2022.

⁷ See [KPMG report: Analysis and Observations on initial guidance on new 1% stock repurchase excise tax](#), for a comprehensive explanation of Notice 2023-2

Background⁸

Public corporations commonly repurchase shares from the open market. The repurchase of corporate shares intrinsically strengthens the value of remaining shares by reducing the number of outstanding shares, thereby generally resulting in increased earnings per share. Other potential benefits include favorable tax treatment to certain shareholders, who generally receive capital gains tax treatment on redemption (including recovery of cost basis in the repurchased shares) rather than ordinary income on dividends. Further, stock buybacks may facilitate a range of capital market transactions beyond the basic buyback scenario, such as acquisitions by special purpose acquisition companies as well as other merger and acquisition transactions. Studies reflect that corporate stock repurchases rose significantly in recent years,⁹ and it appears the new 1% excise tax may be a response to curb the utilization of corporate cash in this manner.¹⁰

What entities may be subject to the excise tax?

In general, section 4501 applies to any covered corporation that repurchases its stock (or whose specified affiliate acquires its stock).¹¹ A covered corporation is any domestic corporation the stock of which is traded on an established securities market.¹² A specified affiliate is any corporation or partnership majority-owned (more than 50%) by a covered corporation.¹³ For excise tax purposes, a repurchase is a redemption (as defined under section 317(b)) and any transaction determined to be economically similar to a redemption with regard to stock of the covered corporation.

De minimis exception

Notice 2023-2 provides certain rules for applying the statutory exceptions of section 4501(e) and clarifies that the determination of whether the \$1 million de minimis exception applies (i.e., because the total fair market value of stock repurchased during the tax year does not exceed \$1 million) is made without regard to (i.e., before the application of) any other statutory exception and the netting rule.

⁸ See generally, Adam Murphy, Maury Passman, and Jeffrey L. Vogel, *Stock Repurchases Under the Build Back Better Act's Excise Tax*, 175 Tax Notes Federal 865 (May 9, 2022).

⁹ See Jay B. Sykes, Cong. Rsch. Serv., Legal Sidebar, LSB10266, [Stock Buybacks: Background and Reform Proposals](#) (2019) [PDF 381 KB]; Jane G. Gravelle, Cong. Rsch. Serv., IL11960, *An Excise Tax on Stock Repurchases and Tax Advantages of Buybacks Over Dividends* (2022).

¹⁰ [Sherrod Brown press release](#), Brown, Wyden, *Unveil Major New Legislation To Tax Stock Buybacks*, August 6, 2022, Finance Committee Chair Ron Wyden, D-Ore., remarks on the Senate floor.

¹¹ Section 4501(c).

¹² Section 4501(d)(1). In addition, the excise tax is applicable to repurchases of stock by public expatriated entities and purchases by domestic specified affiliates of stock of public foreign corporations. The nuances of such arrangements are beyond the scope of this article.

¹³ Section 4501(c)(2)(B). In particular, a corporation more than 50% of the stock of which is owned (by vote or value) directly or indirectly by a covered corporation, and a partnership more than 50% of the capital interests or profits interests is held, directly or indirectly, by a covered corporation.

Adjustments—stock issued or provided (including stock issued through an equity- based compensation arrangement)

Section 4501(c)(3) provides for an adjustment under which the amount of stock treated as repurchased by a covered corporation is reduced by the fair market value of any stock issued by the covered corporation during the taxable year, including the fair market value of any stock issued or provided to employees of a covered corporation (or employees of a specified affiliate of such covered corporation), whether or not such stock is issued pursuant to the exercise of an option.¹⁴ Notice 2023-2 refers to the adjustment as the netting rule.

Specifically, section 4501(c)(3) provides that covered corporation stock that is “issued” to employees of a covered corporation or employees of specified affiliates, including stock option exercises settled in stock, will reduce the amount of stock treated as repurchased by the same amount. For example, if a covered corporation redeems \$10,000,000 of its stock and issues or provides \$9,500,000 to employees through an equity-based compensation plan, the amount subject to the excise tax will be reduced to \$500,000. The \$500,000 will be taxed by the excise tax (because the \$1,000,000 de minimis threshold is tested before the application of the netting rule).

Under section 4501(c)(3), the reduction includes “the fair market value of any stock issued or provided to employees of such covered corporation or employees of a specified affiliate of such covered corporation during the taxable year, whether or not such stock is issued or provided in response to the exercise of an option to purchase such stock.” In this manner, section 4501(c)(3) explicitly requires a reduction for the value of any stock issued by a covered corporation as well as any stock issued in settlement of equity compensation arrangements (such as stock issued “or provided”¹⁵ in settlement of stock options).

Fair market value

In general, the fair market value of the stock for netting rule purposes is the market value of the stock on the date of transfer to a covered employee.¹⁶ Stock is transferred under section 4501 when it is issued or provided. The terms “issued” or “provided” are not specifically defined in the statute. However, Notice 2023-2 treats stock as issued or provided by a covered corporation to an employee on the date in which the employee is “treated as the beneficial owner of the stock for Federal income tax purposes”. In general, an

¹⁴ Certain foreign corporations may not receive an adjustment as the netting rule limits the application to stock issued or provided to the employees of the specified affiliate of such corporations. Such arrangements can be complex and nuanced and may be beyond the scope of this article.

¹⁵ It is unclear what provided means in an equity-based compensation arrangement as it is not defined in the Internal Revenue Code. However, see Notice 2023-2, Example 24 and 25, provided is used to describe the transfer of stock to an employee.

¹⁶ See Notice 2023-2 section 3.08(3)(c), which provides the fair market value of repurchased corporate stock is determined on the date the stock is issued or provided to an employee within the meaning of Notice 2023-2 section 3.08(3)(b). Notice 2023-2 section 3.08(3)(b) provides stock is issued or provided upon transfer to a covered employee. Separately, the fair market value of stock not issued to an employee is the market price of the stock on the date the stock is issued. One of the four methods but not more than one method may be applied to determine the market price of the stock traded on an established securities market repurchase: (1) The daily volume-weighted average price on the repurchase date; (2) The closing price on the repurchase date; (3) The average of the high and low prices on the repurchase date; or (4) The trading price at the time of the repurchase. If the repurchased stock is not traded on an established securities market, the market price is determined by valuation under Treasury Regulation section 1.409A-1(b)(5)(iv)(B)(1).

employee is treated as the beneficial owner of stock when the stock is substantially vested within the meaning of Treasury Regulation section 1.83-1(b).¹⁷

Adjustment considerations with common equity-based compensation arrangements

Stock options

Nonqualified stock options (NSOs) are a form of equity-based compensation providing a participant with the right to purchase a set number of company's shares at a pre-determined strike/exercise price. NSOs are generally settled in shares upon exercise. The fair market value of the stock for adjustment purposes is determined on the date the stock options are exercised. Notice 2023-2 provides that stock transferred to an employee pursuant to an option exercise is issued or provided on the date the employee exercises the option.¹⁸ Further, the income from the shares is includible in income on this date.

Stock appreciation rights (SARs)

SARs are a form of equity-based compensation that provides a participant with the right to the appreciation of a set number of a corporation's shares for a pre-determined period. SARs are often designed to be settled in cash or actual shares. Notice 2023-2 provides the same outcome for SARs as NSOs. The fair market value of stock for adjustment purposes is determined on the date the SARs are issued or provided to the employee. Stock transferred to an employee pursuant to SARs is considered issued or provided when the employee exercises the SARs.¹⁹ Companies with SARs may want to consider settling such arrangements with covered corporation stock upon settlement rather than cash in order to reduce the excise tax (under the netting rule).

Incentive stock options (ISOs)

Like NSOs, ISOs permit employees with the right to purchase a set number of company's shares at a pre-determined strike/exercise price but generally defer employee recognition until the disposition of shares acquired through the exercise. Notice 2023-2 provides that stock transferred to an employee pursuant to an ISO exercise is issued or provided to the employee on the date the employee exercises the option. The fair market value of the stock for adjustment purposes is determined on such date.

Employee stock purchase plans (ESPPs)

ESPPs permit employees to purchase company shares over a specified period, generally at a discounted price. The shares may be treated as issued or provided to an employee on the stock purchase date of an ESPP. Notice 2023-2 provides that the fair market value for adjustment purposes will be the value of the stock on the stock purchase date of the ESPP.

Restricted stock units (RSU) and performance stock units (PSUs)

RSUs and PSUs are generally mere promises to transfer stock or cash in the future following the satisfaction of vesting conditions. RSUs/PSUs are contractual promises to pay stock in the future. Notice 2023-2

¹⁷ See *Miller v. United States*, 345 F. Supp. 2d 1129, 1133 (W.D. Wash. 2005), which defines a beneficial owner as an individual without legal title to property but has rights in the property that are the normal incidents of owning property (i.e., right to receive dividends, right to vote the shares, right to dispose of the shares, and right to use the shares as collateral.).

¹⁸ See Notice 2023-2 section 3.08(3)(b)(ii)

¹⁹ See Notice 2023-2 section 3.08(3)(b)(ii)

provides that stock is issued or provided when the payment of the stock is initiated. RSUs/PSUs are not instantly transferred once an employee satisfies the vesting conditions. Instead, the corporation may notify their transfer agent to transfer the shares or transfer the shares themselves to the employee to satisfy the payment of the RSUs/PSUs. However, generally, there is a delay between the notification to transfer the shares and the actual transfer of the shares. Thus, the notice clarifies that the fair market value for adjustment purposes will be the market value of the shares on the date of notification (initiation) and not the market value on the date of actual transfer. This point is further illustrated in example 24 in the notice:

Example 24: Vested stock provided to an employee with share withholding-- (a) Facts. Employee N is an employee of Corporation X. In 2024, as compensation for Employee N's services, Corporation X grants Employee N 100x restricted stock units (RSUs). Pursuant to the RSUs, if Employee N remains employed by Corporation X through December 31, 2026, Corporation X will transfer 100x shares of Corporation X stock to Employee N in January 2027. Employee N remains employed by Corporation X through December 31, 2026. In January 2027, when the shares have a fair market value of \$50x per share, Corporation X initiates the transfer of 60x shares of Corporation X stock to Employee N and withholds 40x shares to satisfy its income tax and employment tax withholding obligations.

(b) Analysis. 60x shares of Corporation X stock are treated as issued or provided to Employee N when the shares are transferred in 2027. See section 3.08(3)(a)(ii) of this notice. Therefore, Corporation X's stock repurchase excise tax 46 base for its 2027 taxable year is reduced by \$3,000x (60x shares x \$50x per share = \$3,000x).²⁰

Accordingly, companies may consider settling such arrangements with covered corporation stock upon settlement rather than cash to reduce the excise tax (under the netting rule).

Restricted stock

Restricted stock is another common equity-based incentive. Restricted stock involves the transfer of shares to a participant subject to restrictions (shares are received by the participant that are non-transferrable by the participant until vested). If the restricted shares are forfeited (do not vest according to the terms of the arrangement), the restricted shares revert to the employer. If permitted under the relevant arrangement, an employee may make a section 83(b) election to include in gross income the difference between the fair market value of the restricted stock and the amount paid (usually zero) at the date of grant/transfer²¹ which, under subsequent guidance, generally results in the recipient being treated as the owner of the shares on receipt for tax purposes.

Notice 2023-2 provides that if an employee makes a section 83(b) election, the restricted stock will be considered issued or provided on the date of transfer.²² Thus, the fair market value for adjustment purposes will be the market value of the restricted stock on the date of transfer. This point is illustrated in example 23 in the notice:

Example 23: Restricted stock provided to employee with § 83(b) election--(a) Facts. The facts are the same as in section 3.09(22) of this notice (Example 22), except that Employee M elects under § 83(b) to include the fair market value of the shares of restricted stock in gross income when the shares are transferred.

²⁰ See Notice 2023-2 example 24.

²¹ Section 83(b).

²² Section 83(b)(2), an election can be made within 30 days of the transfer of restricted stock to the employee. Thus, an employee can wait 30 days after the transfer to decide whether or not to make the election. However, here the taxable event is the transfer date if the election is made.

(b) Analysis. 100x shares of Corporation X stock are treated as issued or provided to Employee M when the shares are transferred in 2024. See section 3.08(3)(b)(iii) of this notice. Therefore, Corporation X's stock repurchase excise tax base for its 2024 taxable year is reduced by \$5,000x (100x shares x \$50x per share = \$5,000x). No shares of Corporation X stock are treated as issued or provided to Employee M when the shares vest in 2027.²³

In contrast, if a section 83(b) election is not made, the restricted stock is not considered issued or provided until it becomes substantially vested within the meaning of Treasury Regulation section 1.83-3(b). Thus, the fair market value for adjustment purposes will be the market value of the stock when substantially vested. This point is illustrated in example 22 of the notice:

Example 22: Restricted stock provided to employee--(a) Facts. Employee M is an employee of Corporation X. In 2024, as compensation for Employee M's services, Corporation X transfers to Employee M 100x shares of Corporation X restricted stock, when the fair market value of each share is \$50x. The shares vest in 2027. Employee M does not make an election under § 83(b). In 2027, when the shares vest, the shares have a fair market value of \$70x per share. In 2027, Corporation X withholds from Employee M's other wages amounts that are required to pay its income tax and employment tax withholding obligations arising from the stock transfer.

(b) Analysis. 100x shares of Corporation X stock are treated as issued or provided to Employee M when they become substantially vested in 2027. See section 3.08(3)(b)(i) of this notice. Therefore, Corporation X's stock repurchase excise tax base for its 2027 taxable year is reduced by \$7,000x (100x shares x \$70x per share = \$7,000x).²⁴

The notice's discussion of stock options assumes that the options are vested; however, it does not address the early exercise of options, which may result in participants holding restricted stock. Guidance to address this situation would be welcome.

Exemptions—retirement Plans, ESOPs, and similar plans

Section 4501(e) sets forth a number of exemptions, which provide, among other things, that the excise tax does not apply to the extent that:

1. The repurchased stock (or an amount of stock equal to the value of the stock repurchased) is contributed to an employer-sponsored retirement plan, employee stock ownership plan (ESOP), or similar plan;²⁵ or
2. The total value of stock repurchased during the taxable year does not exceed one million dollars (de minimis exception).²⁶

In general, repurchased stock contributed to an employer sponsored retirement plan, ESOP, or similar plan reduces the covered corporation's repurchase stock tax liability (or stock repurchase excise tax base) by

²³ See Notice 2023-2 example 23.

²⁴ See Notice 2023-2 example 22.

²⁵ Section 4501(e)(2).

²⁶ Section 4501(e)(3).

the fair market value of the stock contributed.²⁷ The notice limited the exemption to apply to qualified retirement plans under section 401(a).²⁸

In addition, repurchased stock contributed to an employer sponsored retirement plan, ESOP, or similar plan does not have to be the same class of stock that was repurchased by the corporation. In the case of a contribution of shares of the same class of stock as stock repurchased, the amount by which repurchases are reduced is determined by the aggregate fair market value of repurchased shares of such class divided by the total number of repurchased shares of such class during the tax year (i.e., the average price of repurchased shares of such class). The average price of the repurchased class of shares is then multiplied by the number of the class of shares contributed. This point is illustrated in example 20 in the notice:

Example 20: Multiple repurchases and contributions of same class of stock-- (a) Facts. On January 15, 2023, Corporation X repurchases 100x shares of its Class A stock that have an aggregate fair market value of \$1,000x. Corporation X repurchases 50x shares of its Class A stock on September 15, 2023, that have an aggregate fair market value of \$200x. Corporation X contributes to its employee stock ownership plan 75x shares of its Class A stock on March 15, 2023, and 75x shares of its Class A stock on October 15, 2023.

(b) Analysis. The amount of the reduction to Corporation X's stock repurchase excise tax base is determined by dividing the aggregate fair market value of shares of Class A stock repurchased by the number of shares repurchased ($\$1,200x/150x$ shares = \$8/share) and multiplying the number of shares contributed by the average price of repurchased shares ($150x$ shares x \$8/share = \$1,200x). See section 3.07(3)(c)(i) of this notice. Therefore, Corporation X's stock repurchase excise tax base for its 2023 taxable year is \$0 ($\$1,200x$ repurchase - $\$1,200x$ exception = \$0).²⁹

However, if the repurchased shares are of a different class of stock than the shares contributed, the reduction is the aggregate fair market value of the shares contributed at the time of contribution; however, such amount may not exceed the fair market value of the repurchased stock. This point is illustrated in example 21 in the notice:

Example 21: Multiple repurchases and contributions of different class from repurchased shares-- (a) Facts. On January 15, 2023, Corporation X repurchases 100x shares of its Class A stock that have an aggregate fair market value of \$1,000x. Corporation X repurchases 50x shares of its Class A stock on September 15, 2023, that have an aggregate fair market value of \$200x. Corporation X contributes to its employee stock ownership plan 75x shares of its Class B stock on October 15, 2023, that have an aggregate fair market value of \$1,000x. Corporation X contributes to its employee stock ownership plan 25x shares of its Class B stock on December 15, 2023, that have an aggregate fair market value of \$500x.

(b) Analysis. The amount of the reduction to Corporation X's stock repurchase excise tax base is equal to the sum of the fair market values of the different class of stock at the time that the stock is contributed to the employer-sponsored retirement plan ($\$1,000x + \$500x = \$1,500x$). However, the amount of the reduction must not exceed 45 the aggregate fair market value of stock of a different class repurchased during the taxable year by Corporation X (that is, \$1,200x). See section 3.07(3)(c)(ii) of this notice. Therefore, Corporation X's stock repurchase excise tax base for its 2023 taxable year is \$0 ($\$1,200x$ repurchase - $\$1,200x$ exception = \$0).³⁰

Further, contributions of repurchased stock to an employer sponsored retirement plan, ESOP, or similar plan must occur during the covered corporation's taxable year to reduce the stock repurchase excise tax

²⁷ See Notice 2023-2 section 3.07(3), which provides the general application of repurchased corporate stock contributed to an employer sponsored retirement plan, ESOP, or similar plan.

²⁸ See Notice 2023-2 section 3.02(12).

²⁹ See Notice 2023-2 example 20.

³⁰ See Notice 2023-2 example 21.

base. However, contributions made after the close of a tax year may qualify for the reduction of the excise tax in such prior tax year if contributed by the filing deadline for IRS Form 720.³¹

The Notice defines employer sponsored retirement plans as qualified retirement plans under section 401(a) and ESOPs satisfying the requirements under section 4975(e)(7).³² However, section 4501(e) also refers to the inclusion of similar plans. No clarification is provided for what “similar plan” under 4501(e) means beyond a qualified plan. The IRS invites taxpayers to comment on this open question.

Withholding—sell-to-cover vs. net exercise

Companies are required to withhold payroll taxes when employees recognize income on equity-based compensation arrangements. Companies and employees often fund payroll tax withholding on equity-based arrangements through net exercise or sell to cover arrangements.

Net exercise

With net exercise arrangements, companies may retain shares from the shares to be awarded to employees with a value equal to the payroll tax withholding liability. In this manner, a net exercise arrangement does not result in the retained shares ever becoming shares that are issued to the market. Thus, as noted in Notice 2023-2, shares retained in a net exercise arrangement are not considered issued or provided and do not qualify for an adjustment under the netting rule for excise tax purposes. This is illustrated in example 25 in the notice:

Example 25: Stock option net exercise--(a) Facts. Employee O is an employee of Corporation X. In 2024, Corporation X transfers to Employee O options to purchase 100x shares of Corporation X stock with an exercise price of \$40x per share. The options are described in § 1.83-7 and do not have a readily ascertainable fair market value. Employee O exercises the option to purchase 100x shares in 2025 when the fair market value is \$50x per share. Corporation X withholds 80x shares to pay the exercise price.

(b) Analysis. 20x shares of Corporation X stock are treated as issued or provided to Employee O when the options are exercised in 2025. See section 3.08(3)(a)(iii) of this notice. Therefore, Corporation X’s stock repurchase excise tax base for its 2025 taxable year is reduced by \$1,000x (20x shares x \$50x per share = \$1,000x).³³

It is important to note that ISOs are not normally net exercised as they may lose their preferential tax treatment.

Sell-to-cover

Alternatively, companies and employees may look to fund payroll tax withholdings through a sell to cover arrangement. In a sell to cover arrangement, shares are actually transferred to employees’ brokerage accounts. In turn, the brokerage sells enough shares to cover the withholding tax liability, and the proceeds are then sent to the company to cover the payroll tax withholding liability. Unlike a net exercise arrangement, shares of a covered company issued in a sell to cover arrangement per Notice 2023-2 do qualify for the adjustment calculation because the shares are actually issued and outstanding on the public market.³⁴

³¹ See Notice 2023-2 section 3.07(3)(d), timing of contributions.

³² See Notice 2023-2 section 3.07(12)

³³ See Notice 2023-2 example 25.

³⁴ See Notice 2023-2 section 3.08(3)(a)(iv), sell to cover defined.

Using example 25 above, the 80 shares that were withheld, by contrast in a sell to cover arrangement, would transfer to the employee. Thus, the entire 100 shares, instead of 20, would be treated as issued or provided to Employee O. Consequently, a sell to cover arrangement allows for a larger reduction of the repurchase excise tax base than a net exercise arrangement.

Conclusion

The new stock buyback excise tax should be considered by public corporations repurchasing stock (whether as part of a plan, transaction, etc.). Aside from general corporate matters, there are specific considerations related to equity-based compensation arrangements and retirement plans (including, but not limited to, the funding of payroll withholding taxes). With respect to equity compensation, the notice approach aligns conceptually with section 83 as well as GLAM 2020-004. Such alignment reduces the need for duplicative and differing efforts and is likely welcomed by taxpayers. Although Notice 2023-2 is 52 pages long with 26 examples covering several topics, questions remain on the application of the excise tax. Treasury and the IRS anticipate such and have requested comments on initial rules set forth in the notice as well as additional areas of future guidance.

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