

# REFJ

## The Real Estate Finance Journal

A THOMSON REUTERS PUBLICATION

Fall 2023

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*Christopher R. Stambaugh*

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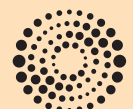
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### A Legal Update for the Title Insurance Industry

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# New Disclosure Requirements for Public Real Estate Investment Trusts' Share Repurchases

*By Mary Katherine Rawls, Heath D. Linsky, Michael H. Friedman and  
Saba Ashraf*

**In this article, the authors discuss new rules applicable to all public real estate investment trusts that repurchase any of their equity securities registered under the Securities Exchange Act of 1934.**

The Securities and Exchange Commission (SEC) has adopted final amendments that call for certain quantitative and qualitative disclosure requirements with respect to repurchases of an issuer's equity securities that are registered under the Securities Exchange Act of 1934, as amended (the Exchange Act).<sup>1</sup> The final amendments apply to all public real estate investment trusts (REITs) - including public non-traded REITs and REITs that are smaller reporting companies - that repurchase any of their equity securities registered under the Exchange Act.

Public domestic issuers will be required to include aggregated quantitative data as an exhibit to their Form 10-Qs and Form 10-Ks, and provide the narrative disclosure in their Form 10-Qs and Form 10-Ks beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For calendar year-end companies, this will be Form

10-K for the year ending December 31, 2023 which will cover repurchases during the fourth quarter of 2023.

Notably, the final amendments come on the heels of the largest publicly traded U.S. REIT share repurchase activity in recent years, according to S&P Global Market Intelligence. In addition, public non-traded REITs are seeing major upticks in repurchase requests.<sup>2</sup> For example, Blackstone Real Estate Income Trust (BREIT), which captured the dominant share of fundraising in recent years, paid out \$9.9 billion in repurchase requests in 2022, which represented 15.2% of the REIT's total net asset value, according to data from Robert A. Stanger & Company.

Given this increased repurchase activity for both publicly traded and public non-traded REITs, REITs should begin preparing now to comply with the new disclosure requirements.<sup>3</sup>

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## QUANTITATIVE DISCLOSURE REQUIREMENTS

Public REITs are currently required to disclose aggregated monthly share repurchase data in their quarterly reports on Form 10-Q and annual reports on Form 10-K.

The final amendments revise Item 703 of Regulation S-K to require issuers that file on domestic forms to file on a quarterly basis the daily repurchase data in an exhibit to their Form 10-Q and Form 10-K (for the fourth fiscal quarter).

The table must include, for each day:

- Class of shares;
- Average price paid per share;
- Number of shares purchased, including number of shares purchased pursuant to a publicly announced plan or on the open market;
- Maximum number of shares (or approximate dollar value) that may yet be purchased under a publicly announced plan;
- Number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18; and
- Number of shares purchased under a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

The disclosure should indicate the remaining balance under publicly announced repurchase plans. Additionally, a checkbox must indicate whether certain officers or directors engaged in share transactions within four business days before or after an announcement of

a repurchase plan or program, or following an increase in a repurchase plan or program.

The final amendments require companies to tag the relevant disclosures in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual.

The daily quantitative repurchase data will be “filed” rather than “furnished” to the SEC. Therefore, public companies will be subject to potential liability under Section 18 of the Exchange Act and Section 11 of the Securities Act for errors or misstatements in connection with their share repurchase disclosures.

## Key Takeaways

As noted above, public REITs are seeing a significant amount of repurchase activity. Given that public REITs have not been required to report daily quantitative information before, public REITs should begin enhancing their financial reporting processes now in order to accurately track and report daily repurchase activity.

## EXPANDED NARRATIVE DISCLOSURE REGARDING REPURCHASE ACTIVITY

The final rules revise and expand narrative disclosure requirements regarding repurchases. Public REITs will now be required to disclose, and refer to the particular repurchases in the exhibit table that correspond to the different parts of the narrative, if applicable:

- The objectives or rationales for their share repurchases and the process or criteria used to determine the amount of repurchases,
- The number of shares purchased other than through a publicly announced plan

or program, and the nature of the repurchase transactions; and

- Any policies or procedures relating to purchases and sales of their securities by their officers and directors during a repurchase program, including any restrictions on such transactions.

Such enhanced disclosures are in addition to those currently required by Item 703 of Regulation S-K with respect to publicly announced repurchase plans or programs.

### Key Takeaways

The SEC indicated that a company should not include a “boilerplate” discussion of its “objective or rationales” for share repurchases. The SEC’s adopting release provides examples of this type of disclosure, and while public REITs’ disclosures may not vary from quarter to quarter, companies should nonetheless establish disclosure controls to ensure that their “objectives or rationales” disclosures are reviewed and revised, if needed, each quarter. Further, when approving a share repurchase program or plan, the boards of directors of public REITs should evaluate, and include in their minutes, the objectives or rationales for share repurchases and the process or criteria used to determine the amount of repurchases.

### NEW DISCLOSURE REQUIREMENTS FOR RULE 10b5-1 TRADING PLANS

The final amendments require public companies with Rule 10b5-1 trading plans to disclose the adoption or termination of any Rule 10b5-1 trading arrangement within the last fiscal quarter, including material terms such as the

date, duration, and aggregate number of securities involved.

### Key Takeaways

The new disclosure requirements for Rule 10b5-1 trading plans are similar to the rules adopted by the SEC in December 2022, which require periodic reporting regarding Rule 10b5-1 trading plans adopted or terminated by executives or directors, however, companies are not required to disclose whether they entered into an arrangement that meets the SEC’s definition of a “non-Rule 10b5-1 trading arrangement.” The SEC also confirmed in the final amendments that it is not imposing additional conditions on the availability of the Rule 10b5-1 affirmative defense on companies, such as a cooling-off period, limitations on the use of multiple overlapping plans, or limitations on the use of single-trade plans.

### CONCLUSION

The final amendments generally indicate a need for the boards of directors of public REITs to revisit their processes and disclosure controls regarding repurchases as well as their insider trading policies. Boards should consider whether they should implement restrictions regarding the purchases and sales of securities by officers and directors during a repurchase plan or program. Although the SEC has not prohibited these transactions, the SEC’s rationale behind the final amendments in the adopting release may suggest that the SEC is looking for companies to implement more restrictions around these transactions.

### NOTES:

<sup>1</sup>SEC Release No. 34-97424 (May 3, 2023) (the

Share Repurchase Adopting Release), <https://www.sec.gov/rules/final/2023/34-97424.pdf>.

<sup>2</sup>“Limits on Non-Exchange Traded REIT Redemptions Are Necessary and Beneficial to Investors,” April 19, 2023, <https://thediwire.com/limits-on-non-exchange-traded-reit-redemptions-are-necessary-and-beneficial-to-investors/>.

vestors/.

<sup>3</sup>We note that the 1% excise tax on stock repurchases by publicly traded corporations under Section 4501 of the Internal Revenue Code of 1986, as amended, which was enacted by the Inflation Reduction Act of 2022 (P.L. 117-169), does not apply to repurchases by REITs.