

SEC Adopts Amendments Regarding Company “Buybacks”

5 May 2023

On May 3, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted rule amendments to expand the disclosure requirements for issuer stock repurchases.¹ These amendments:

- **Tabular Disclosure:** Create a new Exhibit 26 to be filed with Form 10-K and Form 10-Q, and a new filing called a “Form F-SR” for foreign private issuers (“FPIs”), which will require a table disclosing total daily repurchase data *on a quarterly basis*. The amendments also require companies to check a box above this table to indicate whether any officer² or director traded during the four business days before or after their company publicly announced a repurchase program (or an increase of an existing share repurchase plan or program).
- **Narrative Disclosure:** Require narrative disclosure in Form 10-K, Form 10-Q and Form 20-F on repurchase plans, including (1) the objectives and rationale for each repurchase plan and the process or criteria used to determine the amount of repurchases, and (2) any policies and procedures relating to purchases and sales by a company’s officers and directors during a repurchase program.
- **Disclosure of 10b5-1 Plans:** Require domestic companies to disclose on a quarterly basis (in Forms 10-K and 10-Q) whether they adopted or terminated any Rule 10b5-1 trading arrangements during the quarter, including a description of the material terms of the Rule 10b5-1 trading arrangement (other than the price at which trades are authorized to be executed).

Compliance Dates

- **For Calendar Year Domestic Companies, Disclosure First Required in 10-Ks Filed in 2024 for Fiscal 2023:** Domestic issuers (including smaller reporting companies) will be required to comply with the new disclosure in their Forms 10-K and 10-Q beginning with the first filing that covers the first full fiscal quarter beginning on or after October 1, 2023. Therefore, a calendar year-end company will be required to begin disclosing this new information in their *Form 10-K for the fiscal year ending December 31, 2023* relating to repurchases made during the quarter ending December 31, 2023.³
- **For Calendar Year FPIs, First Form F-SR Due August 14, 2024 (45 Days After June 30, 2024):** FPIs will be required to begin filing new Form F-SR for the first full fiscal quarter that begins on or after April 1, 2024. Therefore, a calendar year-end company that is an FPI will be required to begin filing new *Form F-SR for the quarter ending June 30, 2024*. Once required, the Form F-SR will be due 45 days after the end of each fiscal quarter. In addition, the Form 20-F narrative disclosure in Item 16E will be required starting

¹ The final rule is available [here](#), the fact sheet is available [here](#) and the SEC’s press release is available [here](#).

² For domestic issuers, this checkbox requirement applies to any Section 16 officer or director. For FPIs, the requirement applies to any director and member of senior management who would be identified pursuant to Item 1 of Form 20-F, regardless of whether the FPI reports on Forms 6-K and 20-F or on domestic forms.

³ Listed Closed-End Funds will be required to comply with the amendments beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

in the first Form 20-F filed after the first Form F-SR has been filed. Therefore, for calendar year-end FPIs, the new disclosure will first be required in the Form 20-F filed in early 2025 with respect to the 2024 fiscal year.

Background

The newly adopted rules were initially proposed in December 2021⁴ and would have required daily SEC filings of repurchase data. In a welcome change from the proposal,⁵ the final rules instead require that daily quantitative repurchase data must be disclosed *quarterly*.⁶ However, in a change from the proposed rules, the daily quantitative repurchase data required by the final amendments will be treated as *filed with the SEC* rather than furnished, and therefore subject to liability for false or misleading statements under the securities laws.

In adopting the new rules, the SEC stated that these new disclosures will “allow investors to better evaluate whether a share repurchase was intended to increase the value” of the company, or if the repurchase “represented an inefficient deployment of capital, such as by either providing additional compensation to management or impacting accounting metrics in ways that were not intended to increase overall firm value.” Additionally, the periodic reporting purports to mitigate concerns about the “potential misinterpretation of an issuer’s day-to-day changes in trading activity that could cause unjustified stock price volatility or disrupt confidential merger or acquisition discussions” as well as investors using daily data to “gain insight into or identify the issuer’s trading strategies.”

The Commissioners were split in their support for the new rules, voting 3 to 2 to approve them. In particular, the dissenting Commissioners critiqued the expansion of SEC disclosure requirements for FPIs, which have historically not been required to make quarterly filings. For example, SEC Commissioner Mark Uyeda noted that this “change fundamentally upends the Commission’s long-standing and bipartisan approach of largely deferring to the disclosures made by FPIs pursuant to their home country reporting requirements.”⁷

Tabular Disclosure Required Regarding Daily Repurchase Activity

As shown in new Item 601(b)(26) and Form F-SR, the daily repurchase disclosure must be in tabular format and must include, for each day:

- The date on which the purchase was executed;
- Total number of shares purchased on this date;
- Average price paid per share;
- Total number of shares purchased as part of a publicly announced plan;
- Aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under a publicly announced plan;
- Total number of shares purchased on the open market;
- Total number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18; and

⁴ See our alert on the proposed rules, “[SEC Focuses on Potential Misuse of Material Non-Public Information in Stock Trades: Proposed Amendments Regarding Rule 10b5-1 Trading Plans and Company “Buybacks”](#).”

⁵ The adopting release noted that although periodic reporting generally will result in daily repurchase data later than was proposed, investors will still be able to evaluate the “efficiency, purposes and impacts” of issuers’ share repurchases based on the timing of repurchases and the issuer’s stated reasons for the repurchases.

⁶ Listed closed-end funds will be required to disclose daily quantitative repurchase data in their semi-annual and annual reports on Form N-CSR.

⁷ See Commissioner Uyeda’s statement on the final rule, available [here](#).

- Total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

New Checkbox Regarding Director and Officer Trading Activity

The final amendments require issuers to include a checkbox above the tabular disclosures included in Exhibit 26 or Form F-SR, as applicable, indicating whether officers and directors purchased or sold shares of the class of equity securities that is the subject of a share repurchase plan or program *within four business days* before or after the announcement of such repurchase plan or program, or the announcement of an increase of an existing share repurchase plan or program.⁸

Narrative Disclosure Regarding Policies and Objectives of Issuer Share Repurchase Plans under Item 703 and Form 20-F

The final amendments to Item 703 of Regulation S-K and Item 16E of Form 20-F will require issuers to disclose:

- the objectives or rationales for each share repurchase plan or program and the process or criteria used to determine the repurchase amounts; and
- any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction on such transactions.

The final amendments retain the current requirement to disclose the number of shares (or units) purchased other than through a publicly announced plan or program and the nature of the transaction (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or other transactions), as well as certain disclosures related to publicly announced repurchase plans or programs.⁹

New Disclosure Regarding Material Terms of Issuer Repurchase Plans under Item 408(d) of Regulation S-K

Consistent with recently adopted changes to Rule 10b5-1 requiring quarterly disclosures regarding adoptions and terminations of Rule 10b5-1 plans by directors and officers,¹⁰ new Item 408(d) of Regulation S-K will require domestic issuers to disclose quarterly in their Forms 10-Q and 10-K whether they have adopted or terminated a contract, instruction, or written plan to purchase or sell securities intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Issuers are also required to provide a description of the material terms of such plan, other than terms with respect to the price at which trades are authorized. These terms include:

- the date of adoption or termination of the plan and its duration; and
- the aggregate number of securities to be sold or purchased under the plan.

Notably, there is no corresponding requirement for FPIs filing on Form 20-F.

⁸ This is a change from the proposed rules, which would have required checking the box if the triggering trades occurred *within ten business days* before or after the repurchase announcement.

⁹ The disclosure for publicly announced plans or programs includes: (i) the date each plan or program was announced; (ii) the dollar amount (or share or unit amount) approved; (iii) the expiration date (if any) of each plan or program; (iv) each plan or program that has expired during the period covered by the table; and (v) each plan or program the issuer has determined to terminate prior to expiration, or under which the issuer does not intend to make further purchases.

¹⁰ For more information, see our alert, ["SEC Adopts Amendments to Rule 10b5-1."](#)

Inline XBRL

Information disclosed pursuant to Item 601 (in Exhibit 26) and Item 703 of Regulation S-K, Item 16E of Form 20-F and Form F-SR under the new requirements will be required to be reported using Inline XBRL, with detail tagging of the quantitative amounts disclosed within the required tabular disclosures and block text tagging and detail tagging of required narrative and quantitative information.

Key Takeaways & Practical Considerations

These new disclosure requirements are yet another example of the recent trend of requiring detailed, prescriptive SEC disclosures of the inner workings of management's decision-making on matters that have until now not been the subject of public disclosure. They also represent a shift away from carefully crafted disclosure of material information to providing large amounts of data that investors can "combine with other disclosures" and analyze on their own. Although the final rules somewhat lessen the burden from the proposal by not requiring daily reporting, companies will still need to ensure that they have appropriate processes in place to meet the new disclosure requirements, and companies should review their existing policies regarding issuer repurchase plans and insider trading policies applicable to directors and officers in light of these new rules.

Specifically:

- 1. Companies should start to prepare the new Exhibit 26 or Form F-SR, as applicable, *in real time* during the first quarter that the new disclosures apply.**

To this end, companies should begin completing the new Exhibit 26 or Form F-SR during each quarter for which they are required to report, to alleviate the burden prior to the filing deadline. Accordingly, for calendar year-end domestic companies, starting October 1, 2023, we recommend that the new Exhibit 26 be completed on a daily, or no less than weekly, basis.

At this stage, companies should also confirm that they have processes in place to ensure all repurchase data that is required to be disclosed in their quarterly filings is collected and shared with the appropriate personnel to enable the completion of the tabular disclosures in a timely manner. In addition, companies should confirm that the broker reports they receive include the necessary information to allow them to appropriately complete the tabular disclosures.

- 2. Companies should review their existing insider trading policies as they relate to "black out" periods that prohibit trading by directors and officers and consider prohibiting any trading by directors and officers in the four day period prior to or after the announcement of new or amended repurchase plans.**

Given the new checkbox required above the new tabular disclosure, companies should consider implementing special black outs for discretionary trading by directors and officers to avoid the question of whether their trading activity benefitted from such announcements. Companies may also want to consider including voluntary disclosure if such trading activity occurred pursuant to a pre-established 10b5-1 trading plan established by a director or officer that was entered into prior to such announcement. Moreover, companies should consider their policies and practices with respect to the trading of directors and officers at the time that the company is engaging in active repurchases in the open market, and take measures to avoid any impact or influence of such trading on the company's repurchase decisions.

- 3. Companies should begin to consider what they plan to disclose regarding their repurchase programs, including in light of any existing disclosures, to determine the additional disclosure that may be warranted.**

In light of the new detailed narrative disclosure requirements, we recommend that companies review their existing publicly disclosed rationales for these programs, if any, to determine what additional information will be required to be disclosed. Companies may consider drafting their new narrative disclosures well in advance of the deadlines for reporting. The new rules also require disclosure of the criteria for determining the amount that will be repurchased, which could require companies to consider any

statements about their capital allocation programs generally. This new more detailed disclosure could invite additional scrutiny regarding the reasons why a company is conducting repurchases, rather than using their cash for alternatives such as investments in the business or merger and acquisition activity.

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