

LEGAL UPDATES

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SEC Heightens Issuers' Share Repurchase Disclosure Requirements

On May 3, 2023, the Securities and Exchange Commission (SEC) adopted amendments to the disclosure requirements relating to issuers' repurchases of their equity securities. The SEC's full adopting release related to these rules can be found [here](#) and a related summary Fact Sheet from the SEC is available [here](#). As outlined below, the amendments require additional detail regarding the structure of an issuer's repurchase program, require the filing of daily quantitative repurchase data on a quarterly or semiannual basis, and add new disclosure requirements related to an issuer's adoption and termination of certain trading arrangements.

While it acknowledged that share repurchases have long been an accepted tool for capital management and returning value to shareholders and "are often employed in a manner that may be aligned with shareholder value maximization," the SEC stated it nevertheless believed additional disclosures were needed to "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."

Specifically, these rule amendments will require issuers to disclose the information described below regarding stock repurchases.

Tabular Disclosure of Daily Repurchase Activity

Prior to these amendments, Item 703(a) of SEC Regulation S-K required issuers to include in their Forms 10-Q and 10-K a table of information regarding company repurchases aggregated on a monthly basis for each month in the quarter covered by the report. The new rules instead require tabular disclosure of an issuer's repurchase activity aggregated on a *daily* basis for the

quarter covered by the report, contained in a new Exhibit 26 to be filed with Form 10-K and 10-Q for issuers reporting on those forms. Registered closed-end management investment companies that are exchange traded (Listed Closed-End Funds) will be required to provide this daily quantitative repurchase data in their annual and semi-annual reports on Form N-CSR. Foreign private issuers (FPIs) reporting on FPI forms will be required to provide this data on a new Form F-SR, which will be due 45 days after the end of each of their fiscal quarters. This table must contain the following information concerning securities purchases made by issuers and their “affiliated purchasers” (as defined in SEC Rule 10b-18(a)(3)):

The date on which the purchase was executed;

The class of shares (or units) purchased;

Total number of shares (or units) purchased on such date;

Average price paid per share (or unit) reported in U.S. dollars, excluding brokerage commissions and other transaction costs;

Total number of shares (or units) purchased as part of a publicly announced repurchase plan or program;

The aggregate maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under a publicly announced repurchase plan or program;

Total number of shares (or units) purchased on such date on the open market (which excludes shares (or units) purchased in tender offers, in satisfaction of issuers’ obligations upon exercise of put options issued by the issuer, and other non-open market transactions);

Total number of shares (or units) purchased on such date that are intended to qualify for the safe harbor provided in SEC Rule 10b-18;

Total number of shares (or units) purchased on such date pursuant to a plan that is intended to satisfy the affirmative defense conditions of SEC Rule 10b5-1(c); and

Disclosure, by footnote to the table, of the date any plan intended to satisfy the affirmative defense conditions of SEC Rule 10b5-1(c) was adopted or terminated.

Simultaneously with the effectiveness of these new disclosure requirements for daily repurchase data, the SEC is repealing current requirements for tabular disclosures of repurchase data on a monthly

basis pursuant to Item 703 of SEC Regulation S-K, Item 16E of Form 20-F and Item 14 of Form N-CSR.

New Checkbox Disclosure

Issuers also will be required to include a checkbox preceding the above-described tabular disclosures of daily repurchase activity, indicating whether any of their directors or covered officers traded in the specified securities within four (4) business days before or after the public announcement of an issuer's repurchase plan or program (or any increase to an existing plan) applicable to such securities. If an issuer has multiple classes of stock registered under the Securities Exchange Act of 1934 (the Exchange Act) under different repurchase plans, it will be required to check the box in its periodic report if, during that period, a covered officer or director purchased or sold shares that are the subject of any share repurchase plan or program during the four-business day period.

For domestic issuers and Listed Closed-End Funds, this checkbox requirement will apply to Section 16 officers (as defined in SEC Rule 16a-1(f)) and directors. For FPIs, this requirement will apply to any director or member of senior management who would be identified under Item 1 of Form 20-F (regardless of whether the FPI has chosen to report on the forms available exclusively to FPIs or on domestic issuer forms). The SEC's instructions also provide that, in determining whether they are required to "check the box" in relation to tabular disclosures for a given quarter, domestic issuers (including Listed Closed-End Funds) may rely on information contained in SEC Forms 3, 4, and 5 filed by their insiders and FPIs, whose securities are exempt from Section 16 of the Exchange Act, may rely on written representations from their insiders (provided, in each case, they have no reason to know such reliance is not reasonable).

Updated Narrative Disclosures Concerning Issuers' Repurchase Programs

While replacing the former requirement for monthly repurchase disclosures with the daily data tables described above, the SEC also updated Item 703 of Regulation S-K, Item 16E of Form 20-F, and Item 14 of Form N-CSR to retain existing narrative disclosure requirements for publicly announced repurchase programs while adding new requirements for narrative descriptions of the following matters (applicable to all of the daily repurchase data required in the new tables, with cross-references to the particular repurchases reflected in the tabular data that correspond to different parts of the narrative, if applicable):

the issuer's objectives or rationales for its share (or unit) repurchases;

the issuer's process or criteria used to determine the amount of repurchases;

the number of shares (or units) purchased other than through a publicly announced plan or program, and the nature of the transaction (such as whether the purchases were made in open market

transactions, through tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or in other transactions); and

any policies and procedures related to purchases and sales of the subject securities by the issuer's directors and officers (or covered members of senior management for FPIs) during the repurchase period.

The following narrative disclosures—previously required in footnotes to the monthly repurchase tables—were retained:

the date each plan or program was announced;

the dollar amount (or amount of shares or units) approved for such program;

the expiration date (if any) for each such plan or program;

each plan or program that has expired during the period covered by the daily repurchases table for the relevant quarter; and

each such plan or program the issuer has decided to terminate prior to its expiration, or pursuant to which the issuer does not intend to make further purchases.

New Narrative Disclosures Concerning Issuers' Adoption and Termination of Rule 10b5-1 Trading Arrangements

The SEC deferred consideration of disclosure requirements related to issuers' use of SEC Rule 10b5-1 trading plans in December 2022 when it approved disclosures required by new Item 408 of Regulation S-K concerning the use of such plans by other insiders (as detailed in our related Legal Update [here](#)). This allowed the SEC to consider such disclosures in context with the rest of these updates to its issuer share repurchase regulations.

The result was a new Item 408(d) added to Regulation S-K, requiring issuers that file periodic reports on Forms 10-K and 10-Q to disclose whether, during the issuer's most recently completed fiscal quarter (its fourth fiscal quarter in the case of an annual report), the issuer adopted or terminated a contract, instruction, or written plan to purchase or sell its securities intended to satisfy the affirmative defense conditions of SEC Rule 10b5-1 trading plans in periodic reports on Forms 10-Q and 10-K. Such disclosure also will be required to include a description of the material terms (excluding authorized trading prices) of any covered contract, instruction or written plan, such as:

the date on which the issuer adopted or terminated the Rule 10b5-1 trading arrangement;

the duration of the Rule 10b5-1 trading arrangement; and

the aggregate number of securities to be purchased or sold pursuant to the Rule 10b5-1 trading arrangement.

FPIs filing their periodic disclosures on F-Series forms and Listed Closed-End Funds will not be subject to these requirements. Consistent with the approach taken in its earlier amendments to the rules governing Rule 10b5-1 trading plans, the SEC is not imposing any “cooling-off” periods on issuers’ use of such trading arrangements, nor is it limiting the use of multiple, overlapping plans or single trade plans by issuers. New Item 408(d) of Regulation S-K also does not require issuers to disclose whether they entered into any “non-Rule 10b5-1 trading arrangements,” as required by Item 408(a) of Regulation S-K for an issuer’s directors and covered officers.

XBRL Requirements

The new disclosures required by these rules will be required to be reported using Inline XBRL, with detail tagging of the quantitative information disclosed and block text and detail tagging of narrative information.

“Filed” Disclosure Treatment and Compliance Dates

In a change from its original proposal, the SEC decided to require that the daily repurchase data required by these amendments—as well as the newly prescribed narrative disclosures—would be treated as “filed” rather than “furnished” disclosure, making it subject to potential liability under Section 18 of the Exchange Act and Section 11 of the Securities Act of 1933 (since it also will be deemed incorporated by reference into registration statement filings). The SEC made this change in light of its decision to require daily repurchase data to be aggregated and disclosed in periodic reports, rather than on a daily basis as initially proposed, which the SEC felt should lessen liability concerns related to potential errors.

Issuers that file on domestic forms must comply with these enhanced buyback disclosure requirements in the filing covering their first full fiscal quarter beginning on or after October 1, 2023. This means that for issuers with a fiscal year ending December 31, these new disclosures will first appear in their 2023 Annual Report on Form 10-K. Closed-End Funds will be required to comply with the new disclosure and tagging requirements in their periodic reports beginning with the Form N-CSR that covers their first 6-month period that begins on or after January 1, 2024, and FPIs that file on FPI forms will be required to comply with new the Form F-SR disclosure requirements beginning with the Form F-SR that covers their first full fiscal quarter that begins on or after April 1, 2024. Notwithstanding these later effective dates for Foreign Private Issuers and Listed Closed-End Funds, there are no extended compliance dates for other types of domestic filers such as smaller reporting companies.

What This Means to You

Issuers should consider a number of matters in preparing for compliance with these new requirements, including:

Ensuring they have appropriate disclosure controls and procedures in place to track and prepare the daily aggregated repurchase data required by the new tabular disclosures. Issuers with active repurchase programs may wish to begin preparing the required tabular disclosures (new Exhibit 26 for domestic issuers) in real time to lessen the burden closer to the compliance deadline.

Ensuring they manage any use of Rule 10b5-1 trading plans in coordination with the disclosure requirements of the new rules, including implementing appropriate disclosure controls and procedures to support the required description of the issuer's process or criteria used to determine the amount of their repurchases. While issuers will not be subject to the "cooling-off periods" applicable to other traders' use of Rule 10b5-1 plans, issuers should consider potential market perceptions associated with the execution of repurchase transactions, or the initiation or cancellation of related trading plans, in relation to the timing of their releases of other information to the market.

Ensuring directors and senior management have given careful consideration to the issuer's policies related to the implementation of its repurchase programs, in light of the new requirement to describe the issuer's "objectives and rationales" for its repurchases. The SEC noted that these disclosures could avoid the use of "boilerplate" language by placing repurchase programs appropriately in context in relation to the issuer's other allocations of available capital. Issuers should also appropriately distinguish between different types of repurchases, such as repurchases made as a means of returning capital to shareholders versus other purposes, such as in connection with executive compensation programs or other tax-driven reasons.

Issuers should review their existing insider trading policies and procedures in light of the new requirement to disclose any "policies and procedures" related to trading by covered officers and directors while the issuer is conducting its own repurchase program (including coordination with any existing pre-clearance requirements for trades by such individuals). While the SEC clarified that this disclosure requirement doesn't require issuers to have any particular policies or procedures, issuers may wish to monitor emerging market perceptions of the timing of such transactions—which the market already tracks through Section 16 reporting—in relation to the new requirement to disclose

issuers' daily repurchases. This may include managing any pre-clearance programs to minimize the chances for "check box" disclosures of trades within four business days of announcements related to issuer repurchase programs and providing appropriate explanation in their disclosures of any such trades that occur pursuant to insiders' own pre-established Rule 10b5-1 trading plans.

Contact Us

Husch Blackwell's Securities & Corporate Governance team will continue to monitor these changes and their implications. Should you have any questions, please do not hesitate to contact Steve Barrett, Brian Wetzstein, Annorah Harris, or your Husch Blackwell attorney.