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Securities Alert

MAY 10, 2023

SEC adopts amendments on share repurchase disclosures

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The SEC's adopted final rules will require issuers to provide additional information on share repurchases, including daily repurchase activity disclosed quarterly and the adoption and termination of Rule 10b5-1 trading plans.



What's the Impact?

- / Public companies should review their disclosure controls and procedures to determine if revisions are necessary to collect the data now required to be disclosed in their Form 10-Q and Form 10-K.
- / Domestic issuers will need to comply with these new amendments in documentation covering the first full fiscal quarter beginning on or after October 1, 2023.
- / FPIs must file a new Form F-SR covering the first full fiscal quarter beginning on or after April 1, 2024.

On May 3, 2023, the U.S. Securities and Exchange Commission (the SEC) adopted amendments requiring certain additional disclosures related to an issuer's¹ share repurchases. The SEC stated

that the purpose of the new enhanced disclosure requirements is to improve the information investors receive to better assess the efficiency of and motives behind an issuer's share repurchases. Thus, issuers should consider the scrutiny that their share repurchase plans and how such plans are administered will likely receive from investors and the SEC after these new disclosure rules take effect.

Disclosures of share repurchases

The final amendments require domestic issuers, including smaller reporting companies, to disclose in their periodic reports in tabular format for *each day* during the reported quarter:

- / The class and total number of shares purchased, including the total number of shares purchased as part of a publicly announced plan;
- / The average price paid per share;
- / The aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under a publicly announced plan;
- / The aggregate total number of shares purchased on the open market;
- / The aggregate total number of shares purchased in transactions intended to qualify for the safe harbor in Rule 10b18; and
- / The aggregate total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

The new rules also require issuers to disclose, by a footnote to the table, the date any plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for the shares was adopted or terminated.

Unlike the SEC's original proposed amendments from December 15, 2021, which would have required issuers to disclose such quantitative daily repurchase activity on a new Form SR that would have to be furnished one business day after the execution of an issuer's share repurchase order, the adopted final amendments have modified the frequency and manner of this disclosure. Domestic issuers are required to disclose the total repurchases made each day for the quarter in an exhibit to their Form 10-Q and Form 10-K (for their fourth fiscal quarter). The new rules do not provide scaled disclosure for smaller reporting companies. In a departure from its historical approach of only requiring foreign private issuers (FPIs) to make filings based on their home country filing requirements, the SEC's new rules require FPIs to file a new Form F-SR at the end of every quarter, which will be due 45 days after the end of such FPIs' fiscal quarter, including the final quarter of the fiscal year. In addition, such daily quantitative repurchase data will be treated as filed instead of furnished in the applicable Form 10-Q, Form 10-K, and Form F-SR.

The new rules eliminate the current requirements in Item 703(a) of Regulation S-K, which requires domestic issuers to disclose monthly repurchase data in their periodic reports, and Item 16E of Form 20-F, which requires FPIs to provide monthly repurchase data in their annual reports on Form 20-F.

For domestic issuers, a checkbox above the tabular disclosures must be included to indicate whether Section 16 officers and directors purchased or sold shares or other units of the class of the issuer's equity securities that are the subject of an issuer share repurchase plan or program within four business days before or after the announcement of that plan or program. An issuer may rely on Section 16 filings in determining if it should check the box provided that the reliance is reasonable. For FPIs, this checkbox requirement will apply to directors and members of senior management who are identified pursuant to Item 1 of their Form 20-F. An FPI may rely on written representations from its directors and senior management, provided the reliance is reasonable.

Expanded narrative disclosures

The final amendments revise and expand the disclosure requirements in Item 703 of Regulation S-K and Form 20-F. An issuer's periodic reports must now include narrative disclosure of the objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases, as well as provide descriptions of any policies and procedures relating to purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any restriction on such transactions. The SEC stated that although the disclosures required by the final amendments should convey a thorough understanding of the issuer's objectives or rationales for the repurchases, the final amendments do not require issuers to provide disclosure at a level of granularity that would reveal any competitive or sensitive information. The new rules also require disclosure of the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction.

While the existing Item 703 requirements require a footnote to the monthly quantitative share repurchase disclosure table to provide certain information about publicly announced repurchase plans or programs, the new rules will require the same information be disclosed in the main text of the narrative discussion on the share repurchases.

New Item 408(d) of Regulation S-K

The SEC adopted new Item 408(d) of Regulation S-K, which requires domestic issuers, including smaller reporting companies, to disclose the adoption and termination of Rule 10b5-1 trading plans, including a description of the material terms of such plans such as the date of adoption or termination, the duration of the trading plan, and the aggregate number of securities to be purchased or sold pursuant to the trading plan. These disclosures must be made on a quarterly basis in issuers' periodic reports.

The new Item 408(d) does not require disclosure of the price at which the party executing the trading plan is authorized to trade. The SEC noted that issuer 10b5-1 plans are not subject to a cooling-off period, limitations on multiple overlapping plans, or restrictions on the use of single-trade plans.

Although there may be some potential overlap in the disclosure provided pursuant to new Item 408(d) and the amendment to Item 703 of Regulation S-K about an issuer's Rule 10b5-1(c) trading arrangements adopted during the prior fiscal quarter, the new Item 408(d) disclosure is intended

to complement the new Item 703 disclosure. The disclosure requirement in Item 703 will be triggered only if an issuer has conducted a share repurchase in the prior fiscal quarter, whereas the disclosure requirement in new Item 408(d) will be triggered if a Rule 10b5-1 plan was adopted or terminated, regardless of whether a share repurchase transaction pursuant to that plan actually occurred during the prior fiscal quarter that is covered in the Form 10-Q or Form 10-K (for the issuer's fourth fiscal quarter). To prevent potential duplicative disclosures, the SEC has included a note to Item 408(d)(1) which permits a cross-reference to Item 703 disclosures that will satisfy the Item 408(d)(1) requirements.

Structured data requirement

The final amendments require issuers to tag the information disclosed pursuant to Items 601 and 703 of Regulation S-K in a structured, machine-readable data language in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. Issuers must include detail tagging of the quantitative amounts disclosed within the required tabular disclosures and block text tagging and detail tagging of the required narrative and quantitative information.

Compliance timeline

All domestic issuers will need to comply with these new amendments in the Form 10-Q or Form 10-K, as applicable, that covers the first full fiscal quarter that begins on or after October 1, 2023. FPIs will be required to file a new Form F-SR covering the first full fiscal quarter that begins on or after April 1, 2024. The Form 20-F narrative disclosure related to the Form F-SR filings will be required starting in the first Form 20-F filed after the FPI's first Form F-SR has been filed.

What's next?

In light of the significant new disclosure requirements of the final amendments, public companies may want to take the following actions:

- / Review their disclosure controls and procedures to determine if revisions are necessary to collect the data that will be required to be disclosed in their Form 10-Q and Form 10-K, including the information required in the new table for daily share repurchases;
- / Consider whether to adopt policies and procedures regarding trading by Section 16 officers and directors at the time the issuer is actively engaging in share repurchases;
- / Consider amending their insider trading policies to restrict Section 16 officers and directors from trading within four business days of the announcement of the adoption of a share repurchase plan or announcement of an increase in the number of shares under an existing plan, with an exception for trades pursuant to a Rule 10b5-1 plan; and
- / Review prior disclosures regarding the objectives and rationales for share repurchase plans and begin to consider how such objectives and rationales will be disclosed in compliance with the new rules and document such objectives and rationales in board resolutions or minutes. The SEC stated that it does not want boilerplate disclosure and provided examples of disclosure topics that could be used, such as how such a plan fits within the issuer's capital

allocation plan, alternative uses of the capital, whether motivated by the issuer's undervalued stock, and the source of funds for such repurchases.

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¹ The term "issuer" includes "affiliated purchasers" (as defined in 17 CFR 10b-18(a)(3)) and any person acting on behalf of the issuer or an affiliated purchaser.