

Memorandum

SEC Requires More Share Repurchase Disclosure

May 5, 2023

On May 3, 2023, the Securities and Exchange Commission adopted amendments to its issuer share repurchase disclosure rules. Both U.S. and foreign reporting companies, as well as registered closed-end management investment companies that are exchange traded (“listed closed-end funds”), will now be required to provide more public disclosure regarding their share repurchases.

While the SEC abandoned its prior proposal to require issuers to report their repurchases within one business day of execution, the new rule requires that daily quantitative share repurchase data will still need to be filed (and tagged using Inline XBRL) on a quarterly basis (semi-annually for listed closed-end funds).

Issuers must also disclose with this quarterly reporting whether any director or officer made trades in the issuer’s shares within four business days before or after the announcement of a new or amended share repurchase plan.

The SEC will also now require issuers to disclose narratively in their periodic reports their objectives for share repurchases, criteria for determining repurchase amounts and policies for director and officer trades during a repurchase program.

Finally, domestic issuers will be required to disclose quarterly whether they adopted or terminated any Rule 10b5-1 repurchase plans.

The SEC’s release (No. 34-97424) describing the final rules adopted by the SEC can be viewed [here](#), and the fact sheet relating to the final rules can be viewed [here](#).

Timing

Domestic issuers will be required to comply with the new disclosure requirements in their first Form 10-Q or Form 10-K covering the quarter beginning on or after October 1, 2023, with compliance for foreign private issuers (“FPIs”) and listed closed-end funds becoming required thereafter. See “*Compliance Timeline*” on page 5.

Key Takeaways

While the SEC’s move away from the real-time daily repurchase disclosure contemplated in the prior proposal is welcome, significant additional time and attention each quarter will be required to prepare the additional

disclosures that have been required. Moreover, when adopting and implementing their repurchase plans, issuers should be mindful that the availability of detailed daily quantitative data may invite scrutiny as to when share repurchases were made and at what prices in relation to quarterly earnings announcements, compensatory actions, other significant corporate events and insider transactions. Issuers may wish to review their insider trading policies and procedures, which pursuant to rules previously adopted in December 2022 are now required to be publicly disclosed.

In rules adopted in December 2022, the SEC had imposed cooling-off periods of 30 days or more on Rule 10b5-1 plans for directors, officers and other persons. The SEC did not impose a cooling-off period for issuer Rule 10b5-1 repurchase plans at that time and, despite some concerns that it may do so, did not use the current rulemaking to revisit that approach.

New Quarterly Reporting Requirement for FPIs Marks a Significant Shift in Approach

The SEC's amendments require that daily share repurchase data be disclosed by FPIs in tabular format on a new Form F-SR to be filed with the SEC within 45 days after each quarter end. In addition, Form 20-F will now require narrative disclosure about FPIs' repurchase programs and policies substantially similar to that required of domestic issuers, as further discussed below.

The introduction of a quarterly Form F-SR marks a change in the SEC's approach to FPIs, which have not historically been required to file regular quarterly reports with the SEC unless mandated by home country or stock exchange rules. Commissioner Mark Uyeda, who voted against adoption of the new rules, characterized the new requirement as "fundamentally upend[ing] the Commission's long-standing and bipartisan approach of largely deferring to disclosures made by foreign private issuers pursuant to their home country reporting requirements" and predicted that "these amendments may very well be remembered as the beginning of the end to the Commission's approach to foreign private issuers."

FPIs that have not historically filed quarterly reports and that wish to engage in repurchases will have to adapt to a new reporting cadence, and, as with domestic issuers, the new rules may cause them to rethink their purchasing strategies. More importantly, FPIs should be alert for future developments in disclosure rules in the event that these amendments do signal a new era of convergence of the SEC's requirements for FPIs with those that apply to domestic issuers.

FPIs will be required to comply with the new quantitative disclosure requirements by filing a Form F-SR covering the first quarter beginning on or after April 1, 2024. The narrative disclosure will be required beginning with the first Form 20-F filed after the first Form F-SR has been filed. Because an annual report on Form 20-F is required to be filed within four months after the end of an FPI's fiscal year, FPIs with a December 31 year-end will be required to include this narrative disclosure in their Form 20-Fs due on April 30, 2025.

Quantitative Disclosure Requirement for Daily Share Repurchase Data

Each issuer whose securities are subject to Section 12 of the Exchange Act that files quarterly reports on Form 10-Q or an annual report on Form 10-K will be required to provide, in tabular format, the total purchases made each day by or on behalf of the issuer or any “affiliated purchaser” (as defined in Rule 10b-18(a)(3)) of shares or other units of any class of such issuer’s registered equity securities. The information required with respect to each repurchase date (which must be tagged using Inline XBRL) is generally consistent with those required under current Item 703(a) of Regulation S-K but has been updated to require disclosure of the total number of shares purchased (1) on the open market, (2) that are intended to qualify for the Rule 10b-18 safe harbor and (3) pursuant to a plan intended to satisfy Rule 10b5-1(c) affirmative defense conditions. See “*Appendix—Daily Share Repurchase Disclosure Items*” for a list of the items required to be disclosed in the table.

The below table summarizes the rule, filing form and filing deadline applicable to each type of issuer.

<i>Issuer</i>	<i>Rule</i>	<i>Filing Form</i>	<i>Filing Deadline</i>
Domestic Corporate Issuer¹	<i>Item 601(b)(26) of Regulation S-K</i>	<i>Exhibit 26 to Form 10-Q (or Form 10-K for the fourth quarter)</i>	<i>Quarterly; same timing as Form 10-Q (or Form 10-K for the fourth quarter)</i>
Foreign Private Issuer	<i>Rule 13a-21 under the Exchange Act</i>	<i>Form F-SR</i>	<i>Quarterly; within 45 days after the end of the fiscal quarter</i>
Listed Closed-End Fund	<i>Item 14 of Form N-CSR</i>	<i>Form N-CSR</i>	<i>Semi-annually; same timing as Form N-CSR</i>

The new requirement will replace the tabular disclosure required under current Item 703(a), which requires disclosure of monthly share repurchase data on a quarterly basis. In addition, the new rule requires the share repurchase data to be submitted on a filed basis, making it subject to Section 18 liability, in contrast to the SEC’s initial proposed rule that only required the data to be furnished, not filed.

Expansion of Narrative Disclosure Requirements

In addition to retaining the disclosure requirements relating to publicly announced repurchase plans (currently under the Item 703 instructions), the revised rules in Item 703 of Regulation S-K, Form 20-F and Form N-CSR will require an issuer to disclose in narrative form (and tag in XBRL) the following information with respect to its share repurchases (with references to particular repurchases in the share repurchase table, if applicable):

1. The objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases;

¹ A business development company, which is not a registered investment company, would provide the share repurchase disclosure in its Form 10-Q and Form 10-K similar to a domestic corporate issuer.

2. The number of shares (or units) purchased other than through a publicly announced plan or program, and the nature of the transaction; and
3. 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 restrictions on such transactions.

Each issuer will also be required to indicate in a checkbox placed above the new share repurchase table whether any of its directors or officers² traded such issuer's shares that are the subject of a publicly announced repurchase plan within four business days before or after the announcement of such plan (or announcement of an increase of an existing plan).³ Notably, the four business day timeframe has been shortened from the ten business days initially suggested in the SEC's proposed rules.

An issuer must check the box if any director or officer transaction meets the above criteria, regardless of the underlying purpose of the transaction and regardless of whether such transaction was executed pursuant to a Rule 10b5-1 trading plan. The SEC has noted that, to the extent an issuer must check the box for an otherwise unremarkable transaction (*e.g.*, automatic sales to fund tax withholding) and is concerned that it may mislead investors or create a mistaken perception of insider trading, the issuer may provide additional disclosure for context.

Item 408(d) Relating to Issuer Rule 10b5-1 Trading Plans

New Item 408(d) of Regulation S-K will require domestic issuers to disclose on a quarterly basis whether it has adopted or terminated any Rule 10b5-1 trading plans. Issuers will also be required to include descriptions of the material terms (other than pricing terms) of the Rule 10b5-1 trading plan, such as:

1. The date on which the issuer adopted or terminated the Rule 10b5-1 trading plan;
2. The duration of the Rule 10b5-1 trading plan; and
3. The aggregate number of securities to be purchased or sold pursuant to the Rule 10b5-1 trading plan.

The disclosure requirements under Item 408(d) are substantially similar to those under Item 408(a), which was adopted in December 2022 and applies to director and officer Rule 10b5-1 trading plans. Notably, the SEC did not impose any "cooling-off" periods for issuer Rule 10b5-1 trading plans, despite their indication in the December 2022 Rule 10b5-1 Adopting Release that such cooling-off periods remained under consideration.

² Refers to (a) directors and officers reporting pursuant to Section 16(a) of the Exchange Act for domestic corporate issuers and listed closed-end funds and (b) any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F for FPIs.

³ Whereas domestic issuers are already subject to Section 16(a) reporting rules, the new requirement will require significant coordination with directors and officers of FPIs, whose securities are exempt from Section 16(a) reporting.

Compliance Timeline

Domestic corporate issuers will be required to comply with the new disclosure requirements in their first Form 10-Q or Form 10-K covering the quarter beginning on or after October 1, 2023.

FPIs will be required to comply with the new quantitative disclosure requirements on Form F-SR covering the first quarter beginning on or after April 1, 2024. The narrative disclosure will be required beginning with the first Form 20-F filed after the first Form F-SR has been filed.

Listed closed-end funds will be required to comply with the new disclosure requirements in their first Form N-CSR covering the six-month period beginning on or after January 1, 2024.

Appendix

Daily Share Repurchase Disclosure Items

Each issuer whose securities are subject to Section 12 of the Exchange Act will be required to provide, in tabular format, the total purchases made each day by or on behalf of the issuer or any “affiliated purchaser” (as defined in Rule 10b-18(a)(3) under the Exchange Act) of shares (or other units) of any class of such issuer’s registered equity securities, including the following information with respect to each repurchase date:

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price Paid per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
Total								

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