

PULLING BACK THE CURTAIN - SEC PROPOSES EXPANDED SHARE REPURCHASE DISCLOSURES

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Last week, the Securities and Exchange Commission proposed rule amendments that would enhance issuer disclosures regarding their share repurchase transactions.

The proposed rule changes consist of two components, namely:

1. A proposed requirement that issuers file a new “real time” Form SR to report their repurchases much more frequently than they currently do in the periodic reports that they file with the SEC pursuant to Rule 703 of Regulation S-K; and
2. Proposed changes to Rule 703 itself to require more disclosure in 10-Qs and 10-Ks about issuer repurchase activity.

The more frequent and detailed disclosures are designed to lessen the disparity between the information that is known to issuers and their insiders, on the one hand, and investors, on the other. In addition, the proposals respond to commentators’ concerns that repurchases may be used by issuers for earnings management or as a mechanism to increase executive compensation that is tied to share price.

Next Day Reporting on New Form SR. The proposed rules would create a new Form SR that companies making stock repurchases would be required to furnish (not file), using Inline XBRL, before the end of the first business day following the date on which a company (or any affiliated purchaser) executes a share repurchase. The disclosure required by new Form SR would include the:

- repurchase date;
- total number of shares repurchased (whether or not repurchased under publicly announced plans);
- average per share repurchase price; and

- aggregate total numbers of shares repurchased (1) on the open market, (2) on the open market in reliance on the safe harbor provided in Exchange Act Rule 10b-18 and (3) pursuant to a repurchase plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).

More Detailed 10-K/10-Q Disclosures – Amendments to Rule 703 of Regulation S-K. The proposed rule changes would amend existing Rule 703, which specifies the disclosure regarding share repurchases that an issuer is required to make in its periodic reports, such as Forms 10-Q and 10-K. Rule 703, as amended, would require that an issuer add to its periodic reports (and tag using Inline XBRL) disclosure regarding:

- the objective or rationale for the issuer’s share repurchases and the process or criteria used by the issuer to determine the number of securities repurchased;
- any policies and procedures relating to purchases and sales of the issuer’s securities by its officers and directors during the pendency of a repurchase program, including any restrictions on such transactions;
- whether the repurchases were made (1) pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) and, if so, the date of adoption and/or termination of the plan and/or (2) in reliance on the non-exclusive safe harbor of Rule 10b-18; and
- whether any officers or directors subject to Section 16 purchased or sold securities that are the subject of a repurchase plan or program within ten business days before or after the announcement of such a plan or program.

The proposed rules apply to issuers that repurchase securities registered under Section 12 of the Exchange Act, including foreign private issuers and certain registered closed-end funds.

There is a 45-day comment period for the proposed new rules, which will begin on the date of their publication in the Federal Register.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



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