

TIME TO GET READY - SEC ADOPTS EXPANDED SHARE REPURCHASE DISCLOSURES

May 04, 2023

WHAT HAPPENED

On May 3, 2023, a divided SEC adopted rule amendments that significantly increase company disclosures about their share repurchases. The changes will require companies to:

- Disclose daily repurchase activity quarterly;
- Check a box indicating if certain directors or officers traded in the relevant securities within four business days before or after the public announcement of the company's repurchase plan or program;
- Provide narrative disclosure about the company's repurchase programs and practices in its periodic reports; and
- Provide quarterly disclosure in periodic reports related to the company's adoption and termination of 10b5-1 trading arrangements.

Companies will also be required to tag new disclosures using Inline XBRL. Special rules will apply to closed-end funds but are not covered here.

TAKEAWAYS

In anticipation of the rule amendments, companies should evaluate their existing share repurchase plans, and related policies and procedures, including:

- Whether to expressly address trading during a repurchase program in their insider trading policies and procedures. For example, the SEC believes the checkbox requirement – for trades by insiders within four business days of announcement – will help investors identify companies “where there is a possibility that repurchases affected the value of executive compensation.” Even in the case of 10b5-1 trades by insiders, the SEC believes that “[b]ecause repurchases often occur at relatively predictable times in the corporate calendar, executives

can schedule trades in advance to potentially benefit from those repurchases that do occur at such times.”

- Whether to plan for additional disclosures in circumstances where context may be needed for investors to understand any changes in reported repurchase activity, or any trades by insiders within four business days of announcement of a repurchase plan.
- Whether to update repurchase approval procedures, recognizing that the new quarterly trading exhibit will allow investors and regulators “to identify potentially opportunistic behavior,” including with respect to daily repurchases during formal or informal blackout periods for insiders or prior to possible future announcements.
- Whether or how to adjust repurchase activity in relation to confidential corporate matters, such as M&A, in light of any potential signaling from the new quarterly trading exhibit, even if on a delayed basis, and whether to replace discretionary repurchases with a 10b5-1 plan that might reduce the need to suspend purchases during sensitive periods.
- For companies planning repurchases other than in reliance on Rule 10b-18, whether to utilize 10b-18 in light of the new visibility into the volume of daily repurchases.
- When adopting or modifying repurchase plans, how to document the board’s objectives or rationales for repurchases in agendas, board resolutions and minutes in order to ensure consistency with disclosures provided in response to the new rules.
- Whether to modify practices reflected in company 10b5-1 plans (such as no cooling offer periods), in light of new visibility into daily trading activity as well as the requirement to disclose the material terms (other than price).
- Providing lead time to review any accelerated repurchase plan documentation (along with financial and legal advisors) when planning for a new program in order to respond to the new requirements.

COMPLIANCE DATES

All companies – other than foreign private issuers (FPIs) and closed end funds – will be required to comply with the new rules on Forms 10-Q and 10-K beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023.

FPIs that file on FPI forms will be required to comply with the new rules in new Form F-SR beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024. The related Form 20-F narrative disclosure will be required starting in the first Form 20-F filed after the FPI’s first Form F-SR has been filed.

DEEPER DIVE

As discussed in our [December 22, 2021 post](#), the SEC initially proposed amendments to disclosure requirements for share repurchase programs. At that time, it proposed “real time” daily reporting of share repurchases, as well as additional narrative disclosures. On December 7, 2022, the SEC reopened the comment period to take into account the potential effects of the new excise tax on stock repurchases.

According to the SEC, the new disclosures, including daily quantitative repurchase data, “will provide investors with enhanced information to assess the purposes and effects of repurchases, including whether those repurchases may have been taken for reasons that may not increase an issuer’s value” – such as repurchases conducted to increase executive compensation or achieve certain accounting targets, such as those based on EPS.

Quarterly exhibit reporting of daily trading. The amendments require tabular disclosure of a company’s repurchase activity aggregated on a daily basis and “filed” as an exhibit to periodic reports – instead of “furnished” daily on a new form, as originally proposed. A table in the exhibit will be required to include, for each day:

- Execution date;
- Class of shares;
- Total number of shares purchased (by the company or any “affiliated purchaser”);
- 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
- Total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). (A footnote to the table is required to disclose the date any 10b5-1 plan was adopted or terminated.)

Companies that file on domestic forms would file an exhibit to their Form 10-Q and Form 10-K each quarter containing daily repurchase data. FPIs reporting on the FPI forms would disclose the data in a new Form F-SR, which would be filed within 45 days after the end of each fiscal quarter, including the final quarter of each year.

The amendments would eliminate the current requirements in Regulation S-K and Form 20-F to disclose monthly repurchase data in periodic reports.

The SEC believes that quarterly reporting, instead of daily as originally proposed, should mitigate concerns that reporting of daily trading activity could cause unjustified stock price volatility or disrupt confidential corporate transactions. However, as discussed below, Commissioner Peirce still remains concerned.

New checkbox for trading by insiders. Companies will be required to include a checkbox preceding the exhibit table described above indicating whether certain officers and directors purchased or sold shares 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 (including any increase in an existing plan).

- For domestic companies, this checkbox requirement applies to any Section 16 officer or director
- For FPIs, this 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 is reporting on the forms exclusively available to FPIs or on domestic forms.

The four business day window was reduced from the ten business day proposal.

Instructions permit companies to rely on Section 16 forms filed with the SEC or, for FPIs, written representations from insiders, provided, in either case, that reliance is reasonable.

More detailed disclosures in periodic reports. The rule changes amend existing Item 703 to require a company to disclose in Forms 10-Q and 10-K (or Form 20-F in the case of FPIs), with respect to repurchases reported in the quarterly exhibit table:

- The objectives or rationales for each repurchase plan or program and the process or criteria used by the company to determine the number of securities repurchased

The release notes that companies “could discuss the factors driving the repurchase, including whether their stock is undervalued, prospective internal growth opportunities are economically viable, or the valuation for potential targets is attractive. . . . [and] the sources of funding for the repurchase, where material, such as, for example, in the case where the source of funding results in tax advantages that would not otherwise be available for a repurchase.”

- Any policies and procedures relating to purchases and sales by its officers and directors during a repurchase program, including any restrictions on such transactions.

The new rules also require disclosure of:

- 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), and
- For publicly announced repurchase plans or programs:
 - The date each plan or program was announced;
 - The dollar amount (or share or unit amount) approved;
 - The expiration date (if any) of each plan or program;
 - Each plan or program that has expired during the period covered by the table; and
 - Each plan or program the company has determined to terminate prior to expiration, or under which the company does not intend to make further purchases.

Quarterly disclosure of issuer Rule 10b5-1 plans. The amendments add new Item 408(d) of Regulation S-K to require quarterly disclosure in periodic reports on Forms 10-Q and 10-K. The SEC did not propose comparable requirements for FPIs.

Specifically, companies will need to disclose whether, during the most recently completed fiscal quarter the company adopted or terminated a plan intended to satisfy Rule 10b5-1(c). This requirement complements the recently-adopted amendments relating to Rule 10b5-1, as discussed in our [December 15, 2022 post](#), which require quarterly disclosure of trading plans of directors and officers, but not those of companies. Companies will also need to provide a description of the material terms of the contract, instruction, or written plan (other than price), such as:

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

No comparable information is required for non-10b5-1 plans adopted by companies, which the SEC believes have “more limited value to investors” than those for insiders, which are covered by the amendments adopted last December.

Unlike new Item 703, Item 408(d) will require disclosure if a 10b5-1 plan was adopted or terminated, regardless of whether any share repurchase pursuant to that plan actually took place. To prevent potential duplicative disclosures, an instruction to Item 408(d)(1) states that, if the disclosure provided pursuant to Item 703 contains disclosure that would satisfy the requirements of Item 408(d)(1), a cross-reference to that disclosure will satisfy Item 408(d)(1).

Dissenting Commissioners. Commissioners Peirce and Uyeda voted against the amendments.

Peirce criticized the requirement of “immaterial disclosures without sensible exemptions” She believes disclosure of daily repurchase information “will “bury [investors] in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking,” citing the Supreme Court in *TSC Indus. v. Northway* (1976). She also warned that the disclosure could result in release of confidential information, including in “narrow cases,” pending M&A or other confidential corporate actions, citing concerns of commenters. Further, she questioned the failure to grant accommodations for small and foreign companies.

Uyeda objected to the failure to exclude FPIs due to concern it may discourage listings by foreign companies and the failure to consider differences in the reporting regimes of foreign and domestic companies. He criticized the amendments as “fundamentally upend[ing] the Commission’s long-standing and bipartisan approach of largely deferring to the disclosures made by FPIs pursuant to their home country reporting requirements.”

MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

+1 314 259 2149



Eliot W. Robinson

Atlanta

eliot.robinson@bclplaw.com

+1 404 572 6785

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.