



SEC Adopts Amended Issuer Share Repurchase Rules

Client memorandum | May 19, 2023

Authors: Andrew B. Barkan, Lee T. Barnum, Daniel J. Bursky, Mark Hayek, Brian Hecht, Alicia Fitch

Overview

On May 3, 2023, more than a year after issuing its [proposed rules](#) to modernize share repurchase disclosure requirements,^[i] the U.S. Securities and Exchange Commission (the “SEC”) adopted, by a 3-2 commission vote, [final rules](#) governing disclosure of information on issuer share repurchases.^[ii] The final rules require issuers to disclose significantly more information about their stock buybacks, including quarterly disclosure (as part of the issuer’s 10-Ks and 10-Qs) that both presents details of an issuer’s daily buyback activity during the reporting period and includes a narrative description of the rationale and objectives for its share buyback arrangements.^[iii] In addition, the rules impose disclosure requirements regarding the adoption, modification and termination of issuer Rule 10b5-1 trading plans during the reporting period that are similar to the SEC’s recently adopted disclosure requirements for directors and executive officers.

The final rules reflect the SEC’s stated intention to enhance transparency and integrity of the stock buyback process and to address concerns and market perception that some share repurchases may be motivated, at least in part, by factors other than long-term value maximization for shareholders.^[iv] The SEC notes that the absence under the previously existing rules of any qualitative narrative disclosure about repurchase transactions made it difficult for investors to evaluate whether the timing of a given repurchase is motivated by such other factors.^[v] The SEC intends for the new disclosure requirements to enhance investors’ ability to evaluate the purposes, efficiency and impacts of an issuer repurchase.

These rule changes replace or update the current requirements to disclose repurchase data on an aggregated monthly basis within an issuer's quarterly reports. The rules as [proposed](#) would have required issuers to disclose information regarding repurchases within one business day of making a trade. However, in response to substantial opposition received in numerous comment letters from law firms, state and national bar associations, corporations, business groups and scholars,[\[vi\]](#) the SEC scaled back the requirements for timing and manner of disclosure so that reporting of daily quantitative repurchase information is required only on a quarterly basis for domestic companies and foreign private issuers, and semi-annually for listed closed-end funds, instead of the daily reporting requirement contemplated by the proposed rules. Initial reactions from the media and other observers note that this modification represents at least a partial mitigation of the new disclosure burden on reporting companies.[\[vii\]](#)

Expanded Share Repurchase Data Disclosure Requirements

The final rules require both domestic and foreign private issuers to disclose information about purchases of any of their registered equity securities made by or on their behalf, or by an "affiliated purchaser,"[\[viii\]](#) which term includes entities or persons deemed to be acting by or on behalf of an issuer.

Under the new rules, issuers must disclose their repurchase activity in tabular format, aggregated on a daily basis, for each day during the applicable reporting period on which a transaction occurred, and include the following information:

- the execution date of the repurchase;
- the class of securities repurchased;
- the total number of shares repurchased (whether or not repurchased under a publicly announced repurchase plan or program);
- the average price paid per share, excluding brokerage commissions and other costs of execution;
- the total number of shares repurchased as part of publicly announced repurchase plans or programs;
- the aggregate maximum number (or approximate dollar value) of shares that may yet be repurchased under publicly announced repurchase plans or programs;
- the total number of shares repurchased on the open market;
- the total number of shares repurchased in reliance on the safe harbor in Rule 10b-18; and
- the total number of shares repurchased under a Rule 10b5-1 trading plan, along with footnote disclosure of the date of adoption or termination of any such Rule 10b5-1 trading plan.

Domestic issuers will provide this tabular disclosure using inline XBRL format on a new exhibit to Forms 10-Q and 10-K, replacing the current requirement to disclose share repurchases on an aggregated monthly basis in an issuer's periodic reports.^[ix] Companies that report as foreign private issuers will provide the repurchase disclosure quarterly on a new Form F-SR adopted specifically for this purpose. Listed closed-end funds will provide the data on Form N-CSR every six months. All of the newly required tabular information will be considered "filed," rather than "furnished," with the SEC. "Filed" information is subject to certain liability provisions under the Exchange Act that do not apply to "furnished" information. In addition, unlike "furnished" information, "filed" information is automatically incorporated by reference into a reporting issuer's public filings.

The new rules also require issuers to include a checkbox above their tabular disclosures indicating whether directors and covered officers have 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 a period of four business days (shortened from an initially proposed 10 business days) before or after the announcement of an issuer repurchase plan or program. The requirement applies to directors and officers of domestic companies who are subject to Section 16 ownership reporting rules, and to directors and members of senior management required to be identified on Form 20-F for foreign private issuers.

Narrative Disclosure Regarding Issuer Repurchase Programs and Policies

The final rules include an amendment to Item 703 of Regulation S-K that requires narrative discussion of an issuer's share repurchase programs in its periodic reports on Forms 10-Q and 10-K, and equivalent changes to Forms 20-F and N-CSR for foreign private issuers and listed closed-end funds, respectively. The narrative disclosure is intended to complement the tabular data disclosure, and must identify:

- the objective or rationale for each issuer share repurchase plan or program and the process or criteria used to determine the repurchase amounts;
- the number of shares, if any, repurchased other than through a publicly announced plan or program, and the nature of any such transaction;
- for publicly announced repurchase plans or programs, (i) the date each plan or program was announced, (ii) the dollar amount approved, (iii) the expiration date (if any) of each plan or program, (iv) whether any plan or program has expired during the period covered by the repurchase table and (v) whether the issuer has determined to terminate or otherwise cease making further purchases under any plan or program prior to its expiration; and
- any policies and procedures relating to purchases and sales of the issuer's securities by its directors and officers during a repurchase program, including any restrictions on such transactions.

10b5-1 Plan Disclosure

The adopted rules include new Item 408(d) of Regulation S-K, which requires domestic companies to disclose in their periodic reports on Forms 10-Q and 10-K whether they have in the relevant period adopted or terminated a contract, instruction or written plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). Companies covered by the Item 408(d) requirements must also provide a description of the material terms of any such arrangement, including:

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

Consistent with the newly adopted disclosure requirement that applies to Rule 10b5-1 trading plans for directors and executive officers, issuers are not required to disclose pricing terms included in their repurchase programs.

Dates for Compliance

The new rules take effect 60 days after publication in the Federal Register. Each issuer must comply with the adopted rules according to its issuer category as follows:

- **Domestic Issuers.** Both the required quantitative data exhibit and the complementary narrative disclosures must be included by domestic issuers in their periodic reports on Forms 10-Q and 10-K beginning with the first filing that covers the first full fiscal quarter beginning on or after October 1, 2023. For companies with a calendar-year-end fiscal year, the new disclosures will first be included in the Form 10-K for fiscal year 2023, to be filed in the first quarter of 2024.
- **Foreign Private Issuers.** The tabular data required on the new Form F-SR must be filed by covered foreign private issuers beginning with the first full fiscal quarter that begins on or after April 1, 2024. These issuers must then provide the complementary narrative disclosure annually on Form 20-F, starting with the first Form 20-F filed subsequent to the issuer's first Form F-SR filing.
- **Closed-end Funds.** Both the quantitative and narrative disclosures must be made by closed-end listed funds on Form N-CSR, filed semi-annually, beginning with the Form N-CSR that covers the first six-month period beginning on or after January 1, 2024.

[i] *Share Repurchase Disclosure Modernization*, Release No. 34-93783 (Dec. 15, 2021) [87 FR 8443 (Feb. 15, 2022)] ("[Proposing Release](#)").

[ii] *Share Repurchase Disclosure Modernization*, Release No. 34-97424 (May 3, 2023) [__ FR ____ (__. __, 2023)] ("[Adopting Release](#)").

[iii] [Statement on Share Repurchase Disclosure Modernization](#), Gary Gensler, May 3, 2023.

[iv] *Proposing Release at 8444-8446; Adopting Release, p. 14.*

[v] Adopting Release, p. 14. (“Other factors” include: achieving accounting metrics, meeting earnings forecasts, inflation of share price and EPS-linked executive compensation and to satisfy creditors or outside analysts. See, e.g., Adopting Release, n. 32.)

[vi] See, e.g., Adopting Release, pp. 28 *et seq.*, nn. 64, 74.

[vii] See Mark Maurer & Jennifer Williams-Alvarez, [SEC Buyback-Disclosure Rule Stirs Worry Over Costs and Compliance](#), The Wall Street Journal, (May 5, 2023), at 1.

[viii] An “affiliated purchaser” is defined in Rule 10b-18(a)(3) under the Securities Act of 1934 as a “person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer’s securities, or an affiliate who, directly or indirectly, controls the issuer’s purchases of such securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer.”

[ix] Regulation S-K, Item 601(b)(26).

This communication is for general information only. It is not intended, nor should it be relied upon, as legal advice. In some jurisdictions, this may be considered attorney advertising. Please refer to the firm's [data policy](#) page for further information.

Fried, Frank, Harris, Shriver & Jacobson LLP

© 2023. Attorney Advertising. Prior results do not guarantee a similar outcome.