

New Disclosure Requirements for Public REITs' Share Repurchases

WRITTEN BY

Saba Ashraf | Michael H. Friedman | Connor Nechodom | Heath D. Linsky | Mary Katherine Rawls

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On May 3, the Securities and Exchange Commission (SEC) adopted final amendments that call for certain quantitative and qualitative disclosure requirements with respect to repurchases of an issuer's equity securities that are registered under the Securities Exchange Act of 1934, as amended (the Exchange Act).^[1] The final amendments apply to all public real estate investment trusts (REITs) — including public non-traded REITs and REITs that are smaller reporting companies — that repurchase any of their equity securities registered under the Exchange Act.

Public REITs are currently required to disclose in their quarterly reports on Form 10-Q and annual reports on Form 10-K any purchase, aggregated on a monthly basis, made by or on behalf of the issuer or any "affiliated purchaser" of shares or other units of any class of the issuer's equity securities registered under Section 12 of the Exchange Act.

Public domestic issuers will be required to include the quantitative data as an exhibit to their Form 10-Q and Form 10-K, and provide the narrative disclosure in their Form 10-Q and Form 10-K beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For calendar year-end companies, this will be Form 10-K for the year ending December 31, 2023 which will cover repurchases during the fourth quarter of 2023.

Notably, the final amendments come on the heels of the largest publicly traded U.S. REIT share repurchase activity in recent years, according to S&P Global Market Intelligence. In addition, public non-traded REITs are seeing major upticks in repurchase requests.^[2] For example, Blackstone Real Estate Income Trust (BREIT), which captured the dominant share of fundraising in recent years, paid out \$9.9 billion in repurchase requests in 2022, which represented 15.2% of the REIT's total net asset value, according to data from Robert A. Stanger & Company.

Given this increased repurchase activity for both publicly traded and public non-traded REITs, REITs should begin preparing now to comply with the new disclosure requirements.^[3]

What Are the New Disclosure Requirements?

(1) Quantitative Disclosure Requirements

The final amendments revise Item 703 of Regulation S-K to require issuers that file on domestic forms to file on a quarterly basis the daily repurchase data in an exhibit to their Form 10-Q and Form 10-K (for the fourth fiscal quarter).

The table must include, for each day:

- Class of shares;
- Average price paid per share;
- Number of shares purchased, including number of shares purchased pursuant to a publicly announced plan or on the open market;
- Maximum number of shares (or approximate dollar value) that may yet be purchased under a publicly announced plan;
- Number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18; and
- Number of shares purchased under a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

The disclosure should indicate the remaining balance under publicly announced repurchase plans. Additionally, a checkbox must indicate whether certain officers or directors engaged in share transactions within four business days before or after an announcement of a repurchase plan or program, or following an increase in a repurchase plan or program.

The final rules require companies to tag the relevant disclosures in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual.

The daily quantitative repurchase data will be “filed” rather than “furnished” to the SEC. Therefore, public companies will be subject to potential liability under Section 18 of the Exchange Act and Section 11 of the Securities Act for errors or misstatements in connection with their share repurchase disclosures.

Key Takeaways

As noted above, public REITs are seeing a significant amount of repurchase activity. Given that public REITs have not been required to report daily quantitative information before, public REITs should begin enhancing their financial reporting processes now in order to accurately track and report daily repurchase activity.

(2) Expanded Narrative Disclosure Regarding Repurchase Activity

The final rules revise and expand narrative disclosure requirements. Public REITs now will be required to disclose:

- The objectives or rationales for their share repurchases and the process or criteria used to determine the amount of repurchases, and
- Any policies or procedures relating to purchases and sales of their securities by their officers and directors during a repurchase program, including any restrictions on such transactions.

Key Takeaways

The SEC indicated that a company should not include a “boilerplate” discussion of its “objective or rationales” for share repurchases. The SEC’s adopting release provides examples of this type of disclosure, and while most issuers’ disclosure may not vary from quarter to quarter, companies should consider establishing disclosure controls to ensure that such disclosures are reviewed and revised as appropriate each quarter. Further, the boards of director of a public REIT should evaluate when approving an issuer share repurchase program, and include in their minutes the objectives or rationale for its share repurchases, and the process or criteria used to determine the amount of repurchases.

In addition, public REITs should keep in mind the similar but different requirements of the insider trading rule amendments adopted in December 2022 by the SEC and the final amendments’ requirements to disclose the “process or criteria used to determine the amount of repurchases” starting with calendar year-end companies’ 2023 Form 10-K.

(3) New Disclosure Requirements for Rule 10b5-1 Trading Plans

As discussed in our alert, which can be found [here](#), issuers with Rule 10b5-1 trading plans will be obligated to disclose the adoption or termination of any Rule 10b5-1 trading arrangement within the last fiscal quarter, including the date, duration, and aggregate number of securities involved. The SEC also stated that it is not imposing additional conditions on the availability of the Rule 10b5-1 affirmative defense on companies, such as a cooling-off period, limitations on the use of multiple overlapping plans, or limitations on the use of single-trade plans.^[4]

Key Takeaways

The final amendments regarding Rule 10b5-1 plan disclosures indicate a need for the boards of directors of public REITs to revisit their insider trading policies to consider whether they should implement restrictions regarding the purchases and sales of securities by officers and directors during a repurchase plan or program. Although the SEC has not prohibited these transactions, the SEC’s rationale behind the final amendments in the adopting release may suggest that the SEC is looking for companies to implement more restrictions around these transactions.

^[1] SEC Release No. 34-97424 (May 3, 2023) (the “Share Repurchase Adopting Release”). Our alert summarizing the new rules can be found [here](#).

^[2] “Limits on Non-Exchange Traded REIT Redemptions Are Necessary and Beneficial to Investors”, April 19, 2023. The DI Wire.

^[3] We note that the 1% excise tax on stock repurchases by publicly traded corporations under Section 4501 of the Internal Revenue Code of 1986, as amended, which was enacted by the Inflation Reduction Act of 2022 (P.L. 117-169), does not apply to repurchases by REITs.

^[4] *Id.*

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