

SEC Adopts Final Rule Amendments That Increase Disclosures Relating to Share Repurchases

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On May 3, the Securities and Exchange Commission (SEC) adopted rule amendments regarding disclosures about repurchases of an issuer's equity securities, or issuer stock buybacks. The final rule and fact sheet can be found [here](#) and [here](#). The new rules include:

- Disclosure by issuers of daily quantitative share repurchase information, either quarterly or semi-annually;
- Inclusion of a checkbox indicating whether certain officers and directors traded in the relevant securities in the four business days before or after the announcement of the repurchase plan or program;
- For each day on which a purchase was made, the number of shares repurchased and the average price, among other disclosures; and
- Disclosures tagged using Inline XBRL.

Companies must comply with the new rules in their 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. For calendar year end companies, this will be Form 10-K for the year ended December 31, 2023, which will cover repurchases during the fourth quarter of 2023. Foreign private issuers (FPIs) will be required to comply with the new rules in new Form F-SR for the first full fiscal quarter that begins on or after April 1, 2024. The Form 20-F narrative disclosure that relates to the Form F-SR filings will be required after the FPI's first Form F-SR has been filed. Listed closed-end funds will be required to comply with the new rules beginning with Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

The final rules include the following:

Enhanced Periodic Disclosure

The final rules revise and expand the current periodic disclosure requirements in Item 703 of Regulation S-K (applicable to Form 10-K and Form 10-Q), Form 20-F, and Form N-CSR.

The final rules require the same detail as the SEC originally proposed but in quarterly or semi-annual reports rather than on a daily basis. The final rules eliminate current requirements in Regulation S-K, Form 20-F, and Form N-CSR to disclose monthly repurchase data in periodic reports. Instead, most companies must now include daily quantitative repurchase data (in addition to the new narrative disclosure requirements in the report itself) in an exhibit to their Forms 10-Q and Form 10-K, while listed closed-end funds must include this information in their semi-annual and annual reports on Form N-CSR. FPIs must include this information every quarter in new Form F-SR, due within 45 days after the end of each fiscal quarter.

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

Daily Repurchase Activity Disclosure

The final rules require disclosure in tabular format, by date, for each class or series of securities purchased:

- Identification of the class of securities purchased;
- The total number of shares (or units) purchased, whether or not made pursuant to publicly announced plans or programs;
- The average price paid per share (or unit);
- The aggregate total number of shares (or units) purchased on the open market;
- The aggregate total number of shares (or units) purchased in reliance on the safe harbor in Rule 10b-18 under the Exchange Act (Rule 10b-18); and
- The aggregate total number of shares (or units) purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) under the Exchange Act (Rule 10b5-1(c)).

Additionally, the final rules require companies to disclose, by footnote to the daily repurchase table, the date of adoption or termination of the plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) and that relates to the shares shown in the table as having been repurchased under such plan and narrative disclosures regarding:

- The objectives or rationale for their share repurchases;
- The process or criteria used to determine the amount of repurchases; and
- 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 restriction on such transactions.

Checkbox Regarding Specific Trades

The final rules also require each company to check a box above the tabular disclosure of repurchases, indicating whether certain of such company's officers or directors purchased or sold shares or other units of the class of the company's equity securities that are the subject of a company share repurchase plan or program within four business days before or after the announcement of such plan or program. For most public companies and listed closed-end funds, this requirement applies to any officers or directors subject to the reporting requirements of Section 16(a) under the Exchange Act, and for FPIs, this requirement applies to any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F, regardless of whether it is reporting on the forms exclusively available to FPIs or on domestic forms.

Adoption of New Item 408(d)

The final rules also include the adoption of new Item 408(d) of Regulation S-K, which requires quarterly disclosure on Forms 10-Q or 10-K about a company's adoption or termination of a contract, instruction, or written plan to purchase or sell its own securities intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). It must include a description of the material terms, such as the date of adoption or termination, the duration of the Rule 10b5-1 trading arrangement, and the aggregate number of securities to be purchased or sold pursuant to the trading arrangement. New Item 408(d) does not require companies to disclose the price at which the party executing the trading arrangement is authorized to trade.

New Form F-SR Reporting for FPIs

Pursuant to new Rule 13a-21 under the Exchange Act, Form F-SR will be used exclusively to report daily repurchase data and be used only by FPIs. FPIs that report using the FPI forms must disclose the daily repurchase data on the new Form F-SR on a quarterly basis.

Inline XBRL Tagging Requirement

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 structured data requirement is consistent with the SEC's recent initiatives regarding Inline XBRL tagging requirements to improve the quality and usability of data for investors.

Conclusion

The final rules passed on a party-line vote of 3-2. The two dissenting commissioners took issue with the rule, finding it “[mandates immaterial disclosures without sensible exemptions](#)” for small and foreign issuers and shifts away from “[largely deferring to the disclosures made by FPIs pursuant to their home country reporting requirements](#).” Comparatively, the three commissioners that supported the amendments found these changes will “[enhance transparency and integrity of the buyback process](#)” by providing “[more comparable, structured, and comprehensive disclosures](#)” related to company stock buybacks that will allow investors to “[better evaluate the impacts of repurchases on an issuer's share price](#).”

Public reporting companies should review and update their disclosure controls and procedures to ensure they are

able to timely comply with the enhanced periodic disclosures and are able to accurately track daily share repurchase activity and trades made by directors and officers in close proximity to the company's announcement of a share repurchase plan or program. Boards of directors 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. Additionally, boards of directors should consider whether to adopt policies and procedures relating to officers and directors' purchases and sales of the company's securities during an active repurchase program, including any restrictions on such transactions.

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