
Preparing for New Issuer Repurchase Disclosures

MAY 22, 2023

In May 2023, the Securities and Exchange Commission (SEC) amended its rules to significantly increase the disclosures public companies must make about repurchases of their equity securities. The recent amendments are the latest in a series of federal rule changes focused on insider trading and issuer repurchases, including the SEC's December 2022 rulemaking imposing new requirements to rely on Rule 10b5-1 and new disclosures concerning the use of such plans,¹ as well as the new excise tax on share repurchases that became effective January 1, 2023.²

Background

Currently, domestic registrants are required under Item 703 of Regulation S-K to disclose information about share repurchases in quarterly and annual reports, aggregated on a monthly basis and in tabular format. On December 15, 2021, the SEC proposed amendments, which, among other things, would have mandated daily reporting of quantitative data on issuer repurchases on a new, standalone form.³ The new form would have been required to be furnished electronically via EDGAR one business day after execution of an issuer's share repurchase order. The SEC reopened the comment period on the proposal twice and received nearly 200 comment letters from issuers, investors and other stakeholders. Commenters raised an array of concerns about the rule proposals, with the feasibility of and necessity for the one-day reporting requirement chief among the comments raised by issuers.

¹ See our December 30, 2022 Client Alert, available at <https://www.wilmerhale.com/en/insights/client-alerts/20221229-getting-ready-for-amended-rule-10b5-1-and-other-new-requirements>.

² See our August 26, 2022 Client Alert, available at <https://www.wilmerhale.com/en/insights/blogs/Focus-on-Audit-Committees-Accounting-and-the-Law/20220829-evaluating-the-new-stock-buyback-tax>.

³ Share Repurchase Disclosure Modernization, Release No. 34-93783 (December 21, 2021), <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

On May 3, 2023, in a 3-2 vote along party lines, the SEC adopted final repurchase disclosure requirements.⁴ In a significant departure from the 2021 proposal, the final amendments do not require reporting repurchase information within one business day.⁵ Rather, the amendments will require quarterly reporting of daily repurchase data, as well as new qualitative disclosures related to issuer repurchase programs and activity, including a description of the issuer’s policies and procedures regarding repurchase plans.⁶ In addition, the amendments will require quarterly disclosure related to adoption, modification and termination of issuer Rule 10b5-1 trading arrangements. There are no accommodations for smaller reporting companies or emerging growth companies. In a notable departure from the historical approach to foreign private issuer reporting requirements, foreign private issuers will be required to file quarterly reports with the repurchase information.⁷

New Issuer Repurchase Disclosure

The amendments impose new disclosure requirements for issuers that engage in repurchases of their equity securities. These new requirements include:

Quarterly Reporting of Daily Repurchase Data. Issuers that are subject to the reporting requirements of the Exchange Act must, on a quarterly basis, provide daily quantitative repurchase data for purchases 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 that is registered pursuant to Section 12 of the Exchange Act.

For domestic registrants, amended Item 601 of Regulation S-K will require this disclosure in a new Exhibit 26 to Forms 10-K and 10-Q. This new quarterly exhibit will be deemed “filed” for purposes of liability under the Exchange Act, rather than “furnished” as had originally been proposed. The new disclosure requirements also apply to Listed Closed-End Funds, which must provide this disclosure in their annual and semi-annual reports on Form N-CSR, as well as to foreign private issuers, which must provide this disclosure in new Form F-SR, which is due within 45 days after the end of each fiscal quarter.

The new exhibit is required to include disclosure, in the tabular format shown below, of the following items, by date, for each class of securities repurchased:

- the date on which the purchase of shares (or units) is executed (not the settlement date);
- the class of shares (or units), which should clearly identify the class, even if the issuer has only one class of securities outstanding;

⁴ Share Repurchase Disclosure Modernization, Release No. 34-97424 (May 3, 2023), <https://www.sec.gov/rules/final/2023/34-97424.pdf>. [hereinafter Adopting Release].

⁵ *Id.* at 45.

⁶ *Id.* at 1.

⁷ *Id.* at 58.

- the total number of shares (or units) purchased on this date, which includes all shares (or units) purchased by or on behalf of the issuer or any affiliated purchaser, regardless of whether made pursuant to publicly announced repurchase plans or programs;
- the average price paid per share (or unit), reported in U.S. dollars and excluding brokerage commissions and other costs of execution;
- the total number of shares (or units) purchased on this date as part of publicly announced repurchase plans or programs;
- the aggregate maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the publicly announced repurchase plans or programs;
- the total number of shares (or units) purchased on this date on the open market, which includes all shares (or units) repurchased by the issuer in open-market transactions, and does not include shares (or units) purchased in tender offers, in satisfaction of the issuer’s obligations upon exercise of outstanding put options issued by the issuer, or other transactions;
- the total number of shares (or units) purchased on this date that are intended by the issuer to qualify for the safe harbor in Exchange Act Rule 10b-18; and
- the total number of shares (or units) purchased on this date pursuant to a plan that is intended by the issuer to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c), including footnote disclosure of the date that any such plan was adopted, modified or terminated.

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value of Shares or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
[Insert additional rows as necessary for each day on which a repurchase was executed]								
Total:								

In a footnote to the table, issuers must indicate the date on which any Rule 10b5-1 plan was adopted, modified or terminated.

Disclosure of Insider Trades Close in Time to a Repurchase Plan Announcement. In addition to the tabular data, issuers must also indicate, via a checkbox above the table, whether any of the

issuer's Section 16 officers or directors purchased or sold shares or other units of the class of the issuer's equity securities that are the subject of a repurchase plan or program within four business days before or after the issuer's announcement of such repurchase plan or program.⁸ In determining whether to check this box, issuers are permitted to rely on a review of Section 16 filings, including Forms 3, 4 and 5 and amendments thereto filed with the SEC during the issuer's most recent fiscal year, unless the issuer knows or has reason to believe that a form was filed inappropriately or that a form should have been filed but was not, as well as any written representation from a reporting person that no Form 5 is required.⁹ The checkbox requirement applies even if the transactions in the covered timeframe occurred pursuant to a Rule 10b5-1 trading plan.

Qualitative Disclosure of Repurchase Programs. The amendments also revise Item 703 of Regulation S-K to eliminate the previous monthly tabular repurchase disclosure, which the disclosure in new Exhibit 26 renders unnecessary. Amended Item 703 also introduces the following new disclosure requirements, which must be provided in narrative form:

- the objectives or rationales for each issuer repurchase plan or program;
- the process or criteria used to determine the amount of repurchases; and
- any policies and procedures relating to purchases and sales of an issuer's securities during a repurchase program by their officers and directors, including any restriction on such transactions.

Issuers will need to continue to comply with certain existing requirements under Item 703. For example, issuers must continue to disclose the number of shares (or units) purchased other than through a publicly announced share repurchase 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 tax withholding obligations in connection with vesting of equity awards, or other transactions). For publicly announced repurchase programs, issuers must also continue to disclose the following items:

- 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 covered period; and
- each plan or program the issuer has determined to terminate prior to expiration, or under which the issuer does not intend to make further purchases.

⁸ *Id.* at 11. For a foreign private issuer, the requirement will apply to any director or member of senior management who would be identified under Item 1 of Form 20-F and the checkbox will appear in the new Form F-SR.

⁹ The issuer must maintain the representation in its records for two years, making a copy available to the SEC or its staff upon request. *Id.* at 84.

The new disclosure requirements also apply to Listed Closed-End Funds and foreign private issuers pursuant to parallel amendments to Form N-CSR and Form 20-F.

Additional Disclosure of Rule 10b5-1 Trading Arrangements. In new disclosures mirroring those adopted for non-issuer use of Rule 10b5-1 trading plans, new Item 408(d) of Regulation S-K will now require issuers to disclose in their periodic reports on Forms 10-Q and 10-K whether they adopted or terminated any Rule 10b5-1 trading arrangements during the covered fiscal quarter.¹⁰ The disclosure must include a description of the material terms of the Rule 10b5-1 trading arrangement (other than terms with respect to the price at which the party executing the Rule 10b5-1 trading arrangement is authorized to trade), such as the following:

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

When the duration of an issuer's Rule 10b5-1 trading arrangement exceeds a single quarter, the issuer should keep in mind that the new requirement to disclose the duration and size of Rule 10b5-1(c) trading arrangements may provide visibility into future planned buybacks that is more detailed than the issuer's current disclosures about the overall buyback authorization amount approved by its board of directors.

Given the potential overlap between new Item 408(d) and the Item 703 narrative disclosure discussed above, issuers may satisfy this disclosure requirement by including a cross reference to the disclosure provided in response to Item 703, provided such cross-referenced disclosure satisfies the requirements of Item 408(d)(1).

The Adopting Release affirmed that issuers that rely on recently amended Rule 10b5-1(c)(1) will not be subject to a cooling-off period, any limitation on the use of multiple overlapping plans or any limitation on the use of single-trade plans.¹¹

Other Historic Disclosures About Issuer Repurchases. As is currently the case, disclosures relating to issuer repurchases may still be required in MD&A (typically as part of the liquidity discussion or to explain any material impact of repurchases on reported results) and in the financial statements (including on the face of the balance sheet and the statement of cash flows and in the related notes).

¹⁰ Issuers are not required to disclose whether they entered into an arrangement that meets the definition of a “non-Rule 10b5-1 trading arrangement.”

¹¹ *Id.* at 91.

Timing and Logistical Matters

Issuers will be required to comply with the new disclosure requirements in their Exchange Act periodic reports 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. For issuers with a December 31 fiscal year-end, this means that compliance will be required beginning with the Form 10-K for the fiscal year ending on December 31, 2023 (as it relates to repurchases made during the fourth quarter ending December 31, 2023). Disclosure provided pursuant to the new disclosure requirements must be tagged using Inline XBRL.

Listed Closed-End Funds will be required to comply with the new disclosure and tagging requirements in their Exchange Act periodic reports beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

Foreign private issuers that file forms specific to that status will be required to comply with the new disclosure and tagging requirements in new Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024. For such issuers with a December 31 fiscal year-end, compliance will be required beginning with a Form F-SR for the fiscal quarter ending March 31, 2024. The Form 20-F narrative disclosure and the related tagging requirements will be required starting in the first Form 20-F filed after the first Form F-SR has been filed. For issuers with a December 31 fiscal year-end, compliance will be required beginning with the Form 20-F for the fiscal year ending December 31, 2024.

Practical Considerations

The new amendments introduce a number of questions and considerations for issuers to assess. Although the new disclosures are more than half-a-year away for most issuers, it is advisable to begin preparing well in advance. Similarly, while the new rules are already subject to legal challenge,¹² we are advising clients to assume the new disclosures will be required in the timeframe set forth in the Adopting Release. Insiders will also want to watch for potential amendments to the policies to which they are subject and potential changes to securities trading practices.

Disclosure Controls and Procedures. Issuers should evaluate and modify their disclosure controls and procedures in response to the amendments. In particular, issuers should consider the collection of aggregated daily repurchase data that will be reported in the applicable filing. As part of that, it will be important to ensure there is a clear understanding of who the issuer's affiliated

¹² See the U.S. Chamber of Commerce's May 12, 2023 press release, available at <https://www.uschamber.com/finance/u-s-chamber-sues-the-securities-and-exchange-commission-over-stock-buyback-rule>.

purchasers are, if any¹³, and which transactions constitute repurchases subject to the new requirements.¹⁴

Issuers should also begin crafting the description of the objectives and rationale for their existing repurchase programs and plans to evaluate the alignment of the narrative description with actual repurchase activity. It is worth noting the SEC has emphasized avoiding generic or “boilerplate” language in describing the objectives and rationale for repurchase programs and plans.¹⁵ Accordingly, issuers will need to evaluate their quarterly disclosures for consistency with actual repurchase programs and activity that occurred during the quarter.

Evaluation of Other Policies and Practices. In response to the new requirements, issuers and their boards should consider whether it would be prudent to adopt new or revised policies and practices concerning share repurchases and trading by insiders close in time to the announcement of a new issuer repurchase plan or program or while the issuer is repurchasing shares under a previously disclosed plan or program. For example, issuers and insiders may pay particular attention to the timing of insider trades in connection with an issuer’s repurchase announcement. While the amendments do not restrict any specific activity, the new disclosures will provide much greater visibility into situations where insider trades occur close in time to issuer trades and may create adverse appearances and the potential for misinterpretations by the SEC or the market. Issuers may wish to consider trading blackouts for Section 16 officers and directors in connection with announcements of repurchase programs and plans to avoid the new “checkbox” requirement that may be perceived as a negative governance item. For most issuers, such trading blackouts may be able to fit into the existing terms of insider trading policies that authorize the issuer to impose special blackout periods.

Education and Risk Management. It is important that issuers and insiders understand that investors will soon have access to very granular information about the company’s buyback activities, including daily repurchase activity and the company’s adoption or termination of Rule 10b5-1 trading arrangements. Investors, plaintiffs’ lawyers and the SEC can be expected to apply data analytics to this newly available information to search for, or in hindsight allege, potential connections between issuer buybacks, issuer disclosures and insider transactions (including to assess in hindsight whether insiders selling under their own personal Rule 10b5-1 plans were

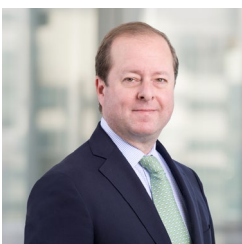
¹³ The concept of “affiliated purchaser” is defined in Exchange Act Rule 10b-18 and refers to a person who (a) acts, directly or indirectly, in concert with the issuer for the purpose of acquiring its securities or (b) is an affiliate of the issuer who, directly or indirectly, controls the issuer’s purchases of its securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer.

¹⁴ Unless the SEC updates or provides new interpretive guidance, issuers should continue to rely on existing [Regulation S-K Compliance and Disclosure Interpretations](#) addressing whether certain transactions constitute repurchases (e.g., a “net” exercise of an option would not result in a deemed repurchase of shares, whereas shares withheld to cover tax withholding obligations pursuant to vesting of restricted stock would result in a deemed repurchase).

¹⁵ *Id.* at 79.

acting in good faith during the duration of their plans as now required under recent amendments to the conditions of a valid Rule 10b5-1 trading arrangement).

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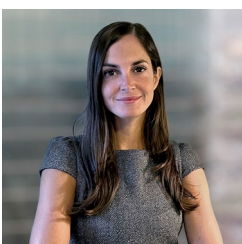
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