

SEC mandates new disclosures for stock buybacks

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While the new rules will not require stock buyback disclosure within one business day as was proposed, they mandate significant new disclosure relating to stock buybacks with no accommodations for foreign private issuers.

On May 3, 2023, the Securities and Exchange Commission adopted new rules in a 3-2 vote that mandate significant new disclosure relating to stock buybacks. In a welcome change from the rule proposal, the new rules drop the requirement to file a report of a company's share repurchases within one business day after each repurchase. But they mandate significant granular disclosure relating to a company's stock buybacks, including disclosure of daily stock repurchases on a quarterly basis, qualitative disclosures about the company's repurchase activity, policies and procedures involving officer and director trading and disclosure about company Rule 10b5-1 plans.

In a departure from longstanding SEC practice, the new rules do not defer to home country requirements for foreign private issuers (and introduce new Form F-SR for quarterly reporting), nor do they make any accommodations for smaller reporting companies. The SEC did clarify in the adopting release, however, that the amendments do not apply to filers under the multijurisdictional disclosure system, or MJDS.

The new rules come a few months after the SEC adopted major changes for insider transactions, which we wrote about separately in a client update.

Stock buyback activity disclosure

Under current rules, a company is required to disclose information about stock buybacks in its quarterly and annual reports aggregated on a monthly basis. The new rules require a company to provide tabular disclosure on a quarterly basis of its daily repurchase activity, including:

- the class of shares purchased,
- the average price paid per share,
- the total number of shares purchased (including the total number purchased as part of a publicly announced plan),
- the aggregate maximum number of shares (or dollar value) that may still be purchased under a publicly announced plan,
- the total number of shares purchased on the open market, and
- the total number of shares purchased intended to qualify for a Rule 10b5-1 trading plan and (separately) the total number of shares purchased intended to qualify for the Rule 10b-18 safe harbor.

In a change from the rule proposal, the new rules also require a company to disclose in a footnote to the daily

repurchase table the date on which any Rule 10b5-1 plan was adopted or terminated (in addition to the new Regulation S-K Item 408(d) disclosure discussed below).

Domestic issuer. A domestic issuer will be required to file the daily repurchase data on a quarterly basis in an exhibit to its Form 10-Q and Form 10-K (for its fourth fiscal quarter).

Foreign private issuer. A foreign private issuer will be required to disclose the daily repurchase data in new Form F-SR, required to be filed within 45 days after the end of its fiscal quarter, which is consistent with the latest deadline for a quarterly report on Form 10-Q. In response to commenters' concerns that the disclosure may be duplicative of what a foreign private issuer is required to disclose under its home jurisdiction rules, to the extent the home country disclosures meet Form F-SR requirements, a foreign private issuer will be permitted to incorporate by reference the related Form 6-K disclosures into its Form F-SR (but this does not obviate the need to file the new form).

Eliminating current monthly repurchase data requirement. The amendments eliminate the current requirements in Item 703 of Regulation S-K and Item 16E of Form 20-F for issuers to disclose monthly repurchase data in periodic reports since the new (and more detailed) requirements on share repurchases aggregated on a daily basis make the existing disclosure requirements redundant.

Checkbox for insider sales

A company will also be required to include a checkbox preceding the tabular disclosures in its periodic reports (Forms 10-Q, 10-K and Form F-SR) 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 (or the announcement of an increase of an existing plan or program).

- **Domestic issuer.** For a domestic issuer, this requirement will apply to Section 16 officers and directors and the checkbox will appear above the tabular disclosures in its Forms 10-Q and 10-K.
- **Foreign private issuer.** 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.

If a company has multiple classes of stock registered under the Securities Exchange Act of 1934, each with its own repurchase plan, a company will be required to check the box in its periodic report if, during that period, a covered officer or director purchased or sold shares of the class that is the subject of any company share repurchase plan or program within four business days before or after the company's announcement of the repurchase plan or program. In addition, the checkbox requirement applies even if shares were sold in the covered timeframe under a Rule 10b5-1 trading plan. One could surmise that the SEC is imposing this requirement to deter officers and directors from making sales during this period.

Expanded buyback narrative disclosure

A company will be required to disclose the following in its periodic reports (Forms 10-Q, 10-K and 20-F):

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

The new rules also require disclosure as part of the narrative discussion (currently required as footnote disclosure to the share repurchase tables under S-K Item 703 and Item 16E of Form 20-F) of the number of shares purchased other than through a publicly announced plan or program (and the nature of how the purchases were effected), as well as details around publicly announced repurchase plans or programs, including:

- the date each plan or program was announced,
- the dollar amount (or number of shares) approved,
- the expiration date (if any) of each plan or program,
- each plan or program that has expired during the period covered in the tabular disclosure, 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.

Under the SEC's new rules for insider transactions adopted in December 2022, a company is required to file as an exhibit to its annual report on Form 10-K or Form 20-F, as applicable, its policies and procedures for directors, officers and employees, and for a domestic issuer, the company itself, that are reasonably designed to promote compliance with insider trading laws (or explain why it has not adopted such policies). The requirement to provide expanded buyback narrative disclosure described above is in addition to, and will apply a year earlier than (for a domestic registrant), the exhibit filing requirement.

A company considering amendments to its trading policy may wish to consider whether any policies and procedures required to be described under the new rules should be included in, or distinct from, the policies and procedures it will file under the insider transactions rules.

Adoption and termination of Rule 10b5-1 plans

In the adopting release for the December 2022 insider transactions rules, the SEC left open for further consideration whether to impose disclosure requirements relating to company Rule 10b5-1 plans. New Item 408(d) under Regulation S-K will require quarterly disclosure in periodic reports on Forms 10-Q and 10-K about a company's adoption and termination of a Rule 10b5-1 trading plan.

Under the new rules, a company (other than a foreign private issuer) will be required to disclose material terms (other than pricing terms) of a company Rule 10b5-1 trading plan, including:

- the date on which the Rule 10b5-1 plan was adopted or terminated,
- the duration of the Rule 10b5-1 plan, and
- the aggregate number of shares to be purchased or sold under the Rule 10b5-1 plan.

While the SEC recognizes that there may be overlap between the Item 408(d) and Item 703 narrative disclosure, it reasons that the Item 703 disclosure is only triggered in the event of repurchases in the relevant fiscal period, whereas Item 408(d) is focused on adoption or termination of Rule 10b5-1 plans regardless of any repurchases actually having occurred during the period. To the extent a company provides Item 703 disclosure that would meet Item 408(d) requirements, the company will be permitted to cross-reference to that disclosure.

Compliance dates

Except where otherwise noted, the new rules apply to all SEC registrants, including foreign private issuers (other than MJDS filers). A domestic issuer will be required to comply with all of the new requirements on a quarterly basis in Forms 10-Q and 10-K. A foreign private issuer will be required to comply with the tabular repurchase and checkbox disclosures on a quarterly basis in Form F-SR, and with the expanded buyback narrative disclosure on an annual basis in Form 20-F.

- **Domestic issuer.** A domestic issuer will be required to comply with the amendments on Forms 10-Q and 10-K (for its fourth fiscal quarter) beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023 (for a calendar year company, the Form 10-K filed in 2024).
- **Foreign private issuer.** A foreign private issuer will be required to comply with the amendments (other than the expanded buyback narrative disclosure) in new Form F-SR (required to be filed within 45 days after the end of a fiscal quarter) beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024 (for a calendar year company, the Form F-SR relating to the second quarter of 2024 filed in August 2024). The expanded buyback narrative disclosure, on the other hand, will be required starting in the first Form 20-F filed after the foreign private issuer's first Form F-SR has been filed (for a calendar year company, the Form 20-F filed in 2025).

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