

Prepare to Comply with SEC's Share Repurchase Disclosure Rules

by Cam C. Hoang

Beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023, most US-listed issuers will be required to make more extensive disclosures on their share repurchase programs and insider transactions proximate to a program's announcement. The Securities and Exchange Commission (the "SEC") adopted [final rules for these disclosures](#). The rules do not require day-after reporting of share repurchases, as was originally proposed; however, they do require a quarterly report on share repurchases on a daily basis (vs on a monthly basis, as currently required) and additional detail regarding the structure of an issuer's repurchase program. Furthermore, the rules require issuers to tag the disclosure using Inline XBRL.

Domestic issuers will disclose the total repurchases made each day for the quarter in their Form 10-Qs and Form 10-Ks (for their fourth fiscal quarters) on a new [Exhibit 26](#), pursuant to Items 703 and 601 of Regulation S-K. We have linked a Word version of Exhibit 26 for easy reference.

Corporate share repurchase programs have been under public scrutiny, and subject to allegations that they are used to enhance short-term performance and boost executive compensation metrics, such as earnings per share, at the expense of long-term investment in the business. And with the implementation of these rules, investors and other third parties will be able to analyze the timing of issuer repurchases in relation to insider transactions and corporate events at a more granular level.

The US Chamber of Commerce has sued the SEC in an effort to block implementation of the rule, under the Administrative Procedure Act and the US Constitution, saying the mandatory disclosure requirements "not only risk the public airing of important managerial decisions but also compel speech in violation of the First Amendment." As of this date, the Fifth Circuit has not enjoined implementation of the rules.

Which issuers are subject to the share repurchase disclosure requirements?

All US-listed issuers are subject to the amended disclosure rules, including foreign

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private issuers filing on Form 20-F (“FPIs”), emerging growth companies (“EGCs”) and smaller reporting companies (“SRCs”). Multijurisdictional disclosure system (“MJDS”) filers that file on Form 40-F are not subject to the amendments.

Commenters who supported an exemption for all FPIs were generally concerned that the requirements would deviate from the SEC’s historic practice of deferring to an FPI’s home country disclosure requirements, and would subject FPIs to multiple, differing disclosure regimes.

Will the disclosure be “filed” or “furnished”?

In a change from the proposed rulemaking, the daily data will be treated as “filed” instead of “furnished,” which means that the disclosure is subject to the liability provisions of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and the Securities Act of 1933, as amended, to the extent that the information gets incorporated by reference into registration statements.

How frequently and where will the share repurchase transactions be disclosed?

Domestic issuers will disclose the total repurchases made each day for the quarter in their Form 10-Qs and Form 10-Ks (for their fourth fiscal quarters) on a new Exhibit 26, pursuant to Items 703 and 601 of Regulation S-K.

Listed Closed-End Funds will disclose daily quantitative repurchase data in their semiannual and annual reports on Form N-CSR.

FPIs reporting on the FPI forms will disclose daily quantitative repurchase data at the end of every quarter in new Form F-SR, which will be due 45 days after the end of each of the issuer’s fiscal quarters. This obligation will be an adjustment for many FPIs, since FPIs that report on the FPI forms do not have a quarterly reporting obligation under the Exchange Act and generally provide repurchase disclosure only in their annual report on Form 20-F.

What details about the share repurchase transactions will be required?

The disclosure will include, for each day:

- The class of shares;
- Average price paid per share;
- Total number of shares purchased, including the total number of shares purchased as part of a publicly announced plan;
- Aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under a publicly announced plan;
- Total number of shares purchased on the open market (new disclosure);
- Total number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18 (new disclosure);and
- Separately the total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) (new disclosure).

The issuer will footnote the date any such plan was adopted or terminated.

Issuers will continue to disclose the number of shares (or units) purchased other than through a publicly announced plan or program, and the nature of the transaction (ie, whether the purchases were made in open-market transactions, tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or other transactions), and certain disclosures for publicly announced repurchase plans or programs under Item 703 of Regulation S-K. The disclosure will now be included in the main text of the narrative discussion instead of as a footnote to a monthly table.

For foreign private issuers, SEC guidance in the form of C&DIs issued in August indicate that a Form F-SR is not required to be filed if, during the covered fiscal quarter, the FPI or affiliated purchaser did not repurchase any of registered equity securities. However, even the repurchase of a very small number of equity securities would trigger a Form F-SR filing. Furthermore, in the absence of repurchases during the covered fiscal quarter, no Form F-SR is required to be filed solely to check the box under "Registrant Purchases of Equity Securities" section of Form F-SR for the covered purchases or sales of securities by a director or member of senior management. Unlike domestic issuers that may report repurchase activity on exhibits attached to periodic reports, FPIs are not permitted to wait to report repurchases during the final quarter of the fiscal year in the Form 20-F for that fiscal year. Rather, a Form F-SR would be required for that final quarter and must be filed within 45 days after the end of the quarter.

For domestic issuers who have not made repurchases during the applicable quarter, there is no comparable guidance on whether they are required to file the applicable Exhibit 26 with blanks. In light of the foregoing C&DIs for FPIs, many issuers may be comfortable omitting the blank exhibit.

What are the new disclosure requirements for director and officer trading?

Issuers will be required to check a box before the tabular disclosure of share repurchases, indicating if certain directors or officers traded in the relevant securities within four business days before or after the public announcement of their repurchase plan or program. The announcement of an increase of an existing share repurchase plan constitutes a new repurchase plan for purposes of the requirement.

- For domestic issuers and Listed Closed-End Funds, this checkbox requirement applies to any Section 16 officer or director, and the issuer may rely on Forms 3, 4 and 5 filed with the SEC in determining whether to check the box provided that the reliance is reasonable.
- For FPIs, this requirement applies to any director and member of senior management who would be identified pursuant to Item 1 of Form 20-F, regardless of whether the FPI is reporting on the forms exclusively available to FPIs or on the domestic forms. Because the securities of FPIs are exempt from Section 16, however, Item 601(b)(26) and Form F-SR permit an FPI to rely on written representations from its directors and senior management provided that the reliance is reasonable. Because FPIs may elect to report using Forms 10-Q and 10-K, for those issuers the checkbox on those forms

will include the Form 20-F reference to directors or senior management.

There are no exemptions for trades made pursuant to Rule 10b5-1 plans or employee benefit plans, even though for example, purchases under an employee stock purchase plan would not trigger Form 4 reporting within two business days. In the adopting release, the SEC takes the position that an issuer may include additional disclosure to provide context to investors, and would be required to do so if such additional disclosures are material and necessary to prevent the required disclosures from being misleading.

What are the new disclosure requirements on issuer repurchase programs and practices?

Issuers will be required to provide narrative disclosure about their repurchase programs and practices in each periodic report. Specifically, with regard to the transactions listed in Exhibit 26 of that Form 10-Q or Form 10-K, the final amendments require an issuer to disclose:

- The objectives or rationales for its 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 issuer's securities during a repurchase program by its officers and directors, including any restriction on such transactions.

The disclosure may need to refer to particular repurchases in the related Exhibit 26 that correspond to different parts of the narrative, if applicable. We have provided additional guidance under "Preparing for Compliance with the New Requirements."

What are the new disclosure requirements on issuer Rule 10b5-1 plans?

Under new Item 408(d)(1) of Regulation S-K, an issuer will be required to provide quarterly disclosure in its Forms 10-K and 10-Q of whether, during its most recently completed fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), the issuer adopted or terminated a contract, instruction, or written plan to purchase or sell its securities intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), along with material terms of the plan except for pricing. This information will also be reported using Inline XBRL. To prevent potential duplicative disclosures, if the repurchase disclosure provided pursuant to Item 703 contains disclosure that would satisfy the requirements of Item 408(d)(1), a cross-reference to that disclosure is adequate.

In a change from the proposal, issuers will not be required to disclose information about the adoption or termination of a non-Rule 10b5-1 trading arrangement as defined in Item 408(c).

When are the new share repurchase disclosure requirements effective?

FPIs that file on the FPI forms will be required to comply with the new disclosure and

Inline XBRL tagging requirements in new Form F-SR beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024 (the quarter ending June 30, 2024 for calendar year-end FPIs). The Form 20-F narrative disclosure that relates to the Form F-SR filings, which is required by Item 16E of that form, 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.

Listed Closed-End Funds will be required to comply with the new disclosure and Inline XBRL 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 (the six-month period ending on June 30, 2024 for calendar year-end Listed Closed-End Funds).

Domestic issuers and all other issuers will be required to comply with the new disclosure and Inline XBRL tagging requirements in their Exchange Act periodic reports on Forms 10-Q and 10-K (for their fourth fiscal quarter) beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023 (Form 10-K for the fiscal year ending December 31, 2023, as it relates to repurchases made during the quarter ending December 31, 2023, for calendar year-end issuers).

Preparing for Compliance

Issuers should:

- Develop a quarterly process to collect, audit and report share repurchase information on a daily basis.
- Develop a quarterly process to track and disclose the adoption, modification and termination of Rule 10b5-1 plans entered into by the issuer.
- Discuss the objectives or rationales for its share repurchases and the process or criteria used to determine the amount of repurchases. The SEC suggests that issuers could discuss the factors driving the repurchase, including whether their stock is undervalued, whether prospective internal growth opportunities are economically viable, or whether the valuation for potential targets is attractive. Issuers might additionally discuss the sources of funding for the repurchase, where material, such as, for example, in the case where the source of funding results in tax advantages that would not otherwise be available for a repurchase. The final amendments do not require issuers to provide disclosure at a level of granularity that would reveal any competitive or sensitive information beyond what may already be gleaned from other disclosures regarding the business and financial condition of the issuer.
- Discuss any policies and procedures relating to purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any notification requirements for, or restrictions on, such transactions. Most insider trading policies currently do not restrict the timing of insider transactions during repurchase programs. However, under the new rules, it will be possible for investors to analyze the timing of insider transactions, the release of material nonpublic information and other corporate events in relation to issuer share repurchases, to see if the repurchases appear to advantage insiders.
- Discuss whether the company is prepared to "check the box" for insider transactions within four days before or after the announcement of a share repurchase program. While there is nothing inherently improper about such transactions as long as they

are conducted while the insider is not aware of material non-public information, it remains to be seen whether issuers will restrict trading by directors and officers, or at least require notice of trading, that is effected during this window, in order to preempt questions about their propriety.