

May 4, 2023

SEC Adopts New Disclosure Requirements for Issuer Share Repurchases

New Rules Impose Significant Disclosure Requirements for Issuer Share Repurchases, Including Quarterly Disclosure of Daily Share Repurchase Activity

SUMMARY

On May 3, 2023, the Securities and Exchange Commission adopted [rules and amendments](#) that:

- Require issuers to disclose daily share repurchase activity on a quarterly basis;
- Require quarterly disclosure regarding the adoption, modification and termination of Rule 10b5-1 trading arrangements by issuers; and
- Require additional detail regarding share repurchase programs, including disclosure of (i) the objectives for share repurchases and the process or criteria used to determine the amount of share repurchases, (ii) policies or procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program and (iii) purchases or sales of shares by Section 16 officers or directors within 4 business days before or after the announcement of a share repurchase program.

In a significant change from the proposed rules, the final rules do not require issuers to report share repurchases within one business day after execution of an issuer's share repurchase order. Instead, after considering a substantial number of comments on the proposed reporting framework, the SEC adopted final rules that require domestic issuers to disclose aggregate daily quantitative repurchase data on a quarterly basis in their Forms 10-K and 10-Q or, in the case of foreign private issuers, on a new Form F-SR.

U.S. domestic issuers (and foreign private issuers reporting on U.S. domestic forms) will be required to comply with the additional disclosure requirements beginning with the first full fiscal quarter that begins on or after October 1, 2023, meaning the Form 10-K for the year ending December 31, 2023 for issuers with a December 31 fiscal year-end. FPIs that file Form 20-F annual reports and other FPI forms will be required

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to file Form F-SR beginning with the first full fiscal quarter that begins on or after April 1, 2024. In advance of the commencement of the new reporting requirements, issuers should adopt controls and procedures for the new quarterly reporting requirements. Issuers should also consider how the new quarterly reporting requirements will impact the optimal design and implementation of their share repurchase program and insider trading policies.

BACKGROUND

On December 15, 2021, the SEC issued proposed rules and amendments relating to issuer share repurchases, including proposing a new Form SR filing requirement. Our [publication](#), dated December 17, 2021, discusses the proposed rules and amendments. During the comment period, which originally ended on April 1, 2022 (and was subsequently reopened twice), the SEC received more than 170 comment letters from issuers, investors, law firms and other stakeholders. The comments discussed, among other things, the benefits to shareholders from share repurchases; the lack of evidence of abuse of, and harm to shareholders from, issuer share repurchases; the expected burden of producing daily Form SR filings; the creation, rather than the alleviation, of information asymmetry; the potential for sophisticated institutional traders to take advantage of the more detailed and frequent information disclosed by issuers to the detriment of retail investors; and the lack of mutual recognition of regimes already applying to many foreign private issuers.

FINAL RULES AND AMENDMENTS

The SEC's final rules and amendments relating to issuer share repurchases in many respects track the proposed rules and amendments but include some significant changes, in particular, with respect to the frequency and manner of quantitative disclosure of daily repurchase data.

Key aspects of the final rules include:

- ***Periodic Disclosure of Daily Repurchase Activity.*** The final rules require domestic issuers to disclose daily quantitative repurchase data on a quarterly basis in their Forms 10-K and 10-Q, with the required tabular disclosure set forth in an exhibit that includes aggregated daily disclosure of:
 - the total number of shares purchased (whether or not pursuant to a publicly announced share repurchase plan or program);
 - the daily average price paid for shares repurchased;
 - the total number of shares purchased as part of a publicly announced share repurchase plan or program;
 - the aggregate maximum number (or approximate dollar value) of shares that may yet be purchased under a publicly announced share repurchase plan or program;
 - the total number of shares purchased (i) on the open market (but not in tender offers or pursuant to the exercise of put options or other transactions), (ii) that are intended to qualify for the safe harbor in Rule 10b-18 or (iii) pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c); and

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- by footnote, the date any plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for the shares was adopted or terminated.

The new disclosure requirements replace existing required monthly disclosures in Forms 10-Q and 10-K.

By requiring issuers to file the required quantitative repurchase data as part of their periodic filings, as opposed to furnishing the data on a separate Form SR within one business day of a repurchase, the final rules subject issuers 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 disclosure. In the Adopting Release, the SEC justifies the imposition of potential liability by noting that issuers will have more time to obtain, verify and compile the required disclosure in advance of filing their periodic reports.

- **Item 408(d) of Regulation S-K.** The final rules require issuers to disclose in their periodic reports on Forms 10-K and 10-Q the adoption or termination by the issuer of any contract, instruction or written plan for the purchase or sale of its own securities that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). The final rules require disclosure of the material terms of the Rule 10b5-1 trading arrangement, including:
 - the date of adoption or termination of the Rule 10b5-1 trading arrangement;
 - the duration of the Rule 10b5-1 trading arrangement; and
 - the aggregate amount of securities to be sold or purchased pursuant to the Rule 10b5-1 trading arrangement.

Item 408(d) of Regulation S-K does not require issuers to disclose the price at which the person executing the respective Rule 10b5-1 trading arrangement is authorized to trade.

- **Item 703 of Regulation S-K.** The final rules amend Item 703 of Regulation S-K to require additional details regarding the structure of an issuer's repurchase program and its share repurchases, including:
 - the objectives or rationales for each share repurchase plan or program and the process or criteria used to determine the amount of repurchases;
 - the number of shares purchased other than through a publicly announced plan or program and the nature of the transactions;
 - descriptive information with respect to publicly announced repurchase plans or programs; and
 - policies or procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including restrictions on such transactions.

Issuers are also required to disclose, by including a checkbox above the tabular daily share repurchase disclosure, whether any Section 16 officer or director purchased or sold shares within 4 business days before or after the issuer's announcement of a share repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program. The issuer is not required to identify which of its officers or directors effectuated any such trades.

With respect to the descriptive information required to be disclosed in connection with publicly announced repurchase plans or programs, the final rules amend Item 703 of Regulation S-K to require certain information that was previously required to be disclosed in a footnote to the monthly quantitative share repurchase disclosure table to instead be disclosed in the narrative of an issuer's periodic reports, including:

- 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;

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- each plan or program that has expired during the relevant 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.
- **XBRL.** The final rules require the required disclosures to be tagged using Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filing Manual. The final rules also require detail tagging of quantitative amounts within the required tabular disclosures and block text tagging and detail tagging of required narrative and quantitative information.

FOREIGN PRIVATE ISSUERS

The new rules extend to foreign private issuers (other than MJDS filers, as described below), who will be required to disclose the same tabular daily share repurchase information described above in a new Form F-SR within 45 days after the end of each fiscal quarter. The SEC notes in the Adopting Release that “if an FPI’s home country disclosures furnished on a Form 6-K satisfy the Form F-SR requirements, it can incorporate by reference its Form 6-K disclosures into its Form F-SR.” FPIs will also be required to include a checkbox above their tabular share repurchase disclosures indicating whether any directors or senior management (as identified pursuant to Item 1 of Form 20-F) have engaged in share purchase or sale activity within the four-business-day period preceding or following announcement of a share repurchase program or increase to a program. FPIs will be required to include in Item 16E of Form 20-F disclosures equivalent to those required under Item 703 of Regulation S-K. These amendments impose for the first time a mandatory quarterly reporting obligation on FPIs.

MULTIJURISDICTIONAL DISCLOSURE SYSTEMS FILERS

Canadian issuers that satisfy their SEC periodic reporting obligations pursuant to the Multijurisdictional Disclosure System (“MJDS”) currently do not provide repurchase disclosure analogous to Item 703 (for filers on the domestic forms) or Item 16E (for FPIs that report using Form 20-F). In response to requests from commenters to clarify the impact of the final rules on MJDS filers, the Adopting Release clarifies that the final rules do not impose the amended repurchase disclosure requirements on Canadian MJDS issuers, noting that such issuers are subject to a separate reporting regime.

LISTED CLOSED-END FUNDS

The final rules require listed closed-end funds to disclose daily quantitative repurchase data in their semi-annual and annual reports on Form N-CSR.

EFFECTIVENESS

The final rules will become effective 60 days following publication of the Adopting Release in the Federal Register.

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U.S. domestic issuers will be required to comply with the amendments in Forms 10-K and 10-Q beginning with the first full fiscal quarter that begins on or after October 1, 2023. For issuers with a December 31 fiscal year-end, the Form 10-K for the year ending December 31, 2023 will need to include disclosures regarding share repurchases made during the fourth quarter of 2023 as well as the new narrative disclosures.

FPIs that report on U.S. domestic forms are required to comply with the requirements applicable to domestic issuers and on the same time frame. FPIs that file Form 20-F annual reports and other non-MJDS FPI forms will be required to file Form F-SR beginning with the first full fiscal quarter that begins on or after April 1, 2024. For FPIs with a December 31 fiscal year-end, a Form F-SR will be required for the quarter ending June 30, 2024 on or prior to August 14, 2024.

Listed closed-end funds will be required to comply with the amendments beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

KEY TAKEAWAYS

The final rules and amendments will require issuers to meet significantly more detailed disclosure requirements relating to issuer share repurchases as well as issuers' use of Rule 10b5-1 trading plans. In light of the new rules, listed below are certain suggestions for issuers to consider ahead of the rules' effectiveness:

- Adopt disclosure controls and procedures for the new quarterly reporting requirements, including with respect to the purchase information that will be reported in the new exhibit.
- Consider the impacts of public disclosure of detailed share repurchase disclosures, including market reactions, the timing of executive compensation decisions vis-à-vis share repurchase program announcements, coordination with an issuer's insider trading policy, and overall compliance.
- Consider the impacts of public disclosure of terminations of share repurchase programs or cessation of share repurchases, for example prior to the announcement of a merger transaction. Although such announcements would be required on a quarterly basis with a lag (rather than immediately upon termination), there could nonetheless be disclosure considerations associated with those announcements.
- Consider whether to impose additional restrictions on transactions by Section 16 officers and directors around the time of announcement of share repurchase programs.
- FPIs should consider the interactions between the new reporting requirements and the timing and disclosure requirements of their home country reporting regimes.

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