

LEGAL UPDATES AND NEWS

SEC Adopts Amendments to Expand Share Repurchase Disclosure

On May 3, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted a final rule to expand disclosure requirements related to an issuer’s repurchase of its equity securities, also known as “share repurchases” or “buybacks.”

Compliance Dates

Reporting requirements under the share repurchase amendments will apply with respect to the first full fiscal quarter that begins on or after October 1, 2023 (for calendar year end companies, this will be the Form 10-K for fiscal year 2023). Accordingly, for the quarterly period commencing October 1, 2023, issuers must start tracking new details about all share repurchases.

Current Disclosure Requirements

Currently, Item 703 of SEC Regulation S-K requires an issuer of securities that are registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to disclose in a tabular format in its periodic reports (quarterly on Form 10-Q and annually on Form 10-K) the following information:

- total number of shares (or units) purchased by the issuer or any affiliated purchaser, during the quarter on a monthly basis by class;
- average price paid per share;
- total number of shares purchased through a publicly announced repurchase plan; and
- maximum number (or approximate dollar value) of shares remaining for purchase under the plan.

New Disclosure Requirements

Reporting of Daily Repurchase Activity

The amendments eliminate the current requirements under Item 703 of Regulation S-K to disclose monthly repurchase data. Instead, amended Item 601 of Regulation S-K will require quantitative daily share repurchase data, in tabular format, to be filed quarterly by issuers on their Form 10-Q and Form 10-K (for the fourth fiscal quarter). For each day the issuer (including any “affiliated purchaser,” as defined in Rule 10b-18 under the Exchange Act) purchases its own registered shares, it will be required to disclose the following information under new Exhibit 26:

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Execution Date	Class of Shares (or Units)	Total Number of Shares (or Units) Purchased	Average Price Paid per Share (or Unit)	Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	Total Number of Shares (or Units) Purchased on the Open Market	Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	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)
Total								

Preceding the above tabular disclosure will be a new check-the-box disclosure indicating whether executive officers (as defined by Section 16(a) of the Exchange Act) or directors purchased or sold company shares or units within four business days before or after an announcement of a share repurchase plan, or an announcement of any increase in a share repurchase plan. Additionally, there must be footnote disclosure to the table that states the date of adoption or termination of any share repurchase plan conducted under a Rule 10b5-1 trading plan.

Enhanced Narrative Disclosures

Purchases of Equity Securities by the Issuer and Affiliated Purchasers

Under amended Item 703 of Regulation S-K, Forms 10-Q and 10-K will require enhanced narrative disclosures with respect to share repurchases, including:

- the objectives or rationales for each share repurchase plan and the process or criteria used to determine the amount of repurchases;
- The number of shares (or units) purchased other than through a publicly announced plan, and the nature of the transaction (e.g., 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);
- any policies and procedures relating to purchases and sales of the issuer’s securities by its officers and directors during a repurchase plan, including any restriction on such transactions; and
- the adoption or termination of company Rule 10b5-1 trading plans, including material terms of such plans and whether the plan was intended to qualify for the affirmative defense under Rule 10b5-1, on a quarterly basis on Forms 10-Q and 10-K filings.

If the repurchase plan is publicly announced, the issuer must also include:

- the date each plan was announced;
- the dollar amount (or share unit amount) approved;
- the expiration date (if any) of each plan;

- each plan that has expired during the period being reported in the table in new Exhibit 26; and
- each plan under which the issuer does not intend to make further purchases.

Insider Trading Arrangements and Policies

Additionally, under new Item 408(d) of Regulation S-K, issuers must disclose on their Forms 10-Q and 10-K whether there was an adoption or termination of a Rule 10b5-1 trading plan by the issuer during the fiscal quarter with respect to share repurchases, which 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);
- 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 a Rule 10b5-1 trading arrangement.

To prevent duplicative disclosures, issuers may satisfy these new Item 408(d) disclosure requirements by cross referencing to disclosures provided in response to Item 703.

Formatting

The amendments require that the share repurchase disclosures be tagged using Inline XBRL.

Next Steps

- Start establishing processes and controls to track daily share repurchase activity, including trades made by directors and officers.
- Issuers should discuss with their banks and brokers their ability to track and provide the required information.
- In light of enhanced narrative disclosures, evaluate internal policies and procedures related to trades made by directors and officers while a share repurchase plan is in place.
- When the board of directors is considering whether to approve a share repurchase plan, they should consider discussing, and including in the resolutions, the objectives and rationales for the issuer's share repurchases, the process and criteria used to determine the amount of share repurchases approved, and any officer or director trades made in the days leading up to the board's decision.

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