

SEC Share Repurchase Disclosure Rules Adopted and Already Challenged

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OVERVIEW

On May 3, 2023, the Securities and Exchange Commission (the SEC) adopted final rules amending the disclosure requirements for repurchases of equity securities by domestic U.S. issuers, foreign private issuers, and registered closed-end management investment companies that are exchange-traded (Listed Closed-End Funds). The final rules require issuers to provide disclosures of daily repurchase activity on a quarterly basis for domestic U.S. issuers and foreign private issuers and on a semi-annual basis for Listed Closed-End Funds. The rules also require new disclosures regarding officer and director purchases and sales of equity securities subject to the issuer's share repurchase program, the rationale and objectives of the repurchases, policies and procedures relating to officer and director purchases and sales during a repurchase program, and adoption and termination of Rule 10b5-1 trading arrangements. While the SEC pulled back from its earlier proposal to require repurchase disclosures within one business day of the repurchase activity, the new requirements mark the first time that the SEC has imposed quarterly reporting requirements of any kind on foreign private issuers (FPIs). The new disclosure requirements have already been challenged in a recent lawsuit filed by the U.S. Chamber of Commerce and other business organizations.

NEW TABULAR DISCLOSURE OF DAILY SHARE REPURCHASES

The final rules require tabular disclosure of daily repurchase activity, replacing the current tabular disclosure of monthly repurchase activity currently required under Rule 703 of Regulation S-K, Item 16E of Form 20-F, and Item 14 of Form N-CSR. The new table must include information on repurchases made by or on behalf of an issuer and any "affiliated purchaser" (as defined in Rule 10b-18(a)(3) under the Securities Exchange Act (the Exchange Act) under the following column headings:

- a. Execution Date
- b. Class of Shares (or Units);
- c. Total Number of Shares (or Units) Purchased;
- d. Average price paid 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 Approximation of Dollar Value) of Shares (or Units) that May Yet be Purchased Under 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; and
- 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).

Issuers that file on domestic forms must file the new tables quarterly as new Exhibit 26 to their quarterly reports on Form 10-Q and annual reports on Form 10-K (for the fourth fiscal quarter). FPIs reporting on FPI forms (Forms 20-F and 6-K) must file the new tables on new Form F-SR, which is due 45 days after the end of each of the FPI's fiscal quarters. Listed Closed-End Funds must file the new tables in their annual and semi-annual reports on Form N-CSR. The tabular information will be treated as filed, rather than furnished as originally proposed, and will be subject to liability under Section 18 of the Exchange Act.

ADDITIONAL DISCLOSURES

The new rules require a checkbox above the tabular disclosure indicating whether certain officers and directors purchased or sold shares (or units) of the class of the issuer's equity securities that is the subject of the repurchase plan or program within four business days (reduced from the proposed 10 business days) before or after the announcement of the issuer's repurchase plan or program. For domestic companies and Listed Closed-End Funds, the covered persons are the Section 16 insiders. For FPIs, the covered persons are the directors and members of senior management identified in Item 1 of Form 20-F (regardless of whether the FPI files on FPI or domestic forms).

In addition to the existing disclosures regarding publicly announced repurchase plans or programs in Forms 10-Q, 10-K, 20-F, and N-CSR, the new rules also require narrative disclosure (with Inline XBRL tagging) of the following information:

- The objectives or rationales for the issuer's share repurchases and the process or criteria used to determine the amounts of the repurchases; and
- Any policies or procedures relating to the purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any restrictions on such transactions.

Following the SEC's December 2022 rule amendments relating to Rule 10b5-1 trading arrangements, the new rules add Item 408(d) of Regulation S-K, which requires quarterly disclosure in Forms 10-Q and 10-K (for the fourth fiscal quarter) about an issuer's Rule 10b5-1 trading arrangements (with Inline XBRL tagging), including:

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

These disclosure requirements mirror the Item 408(a) disclosure requirements for Rule 10b5-1 trading arrangements implemented by directors and officers.

TIMING

FPIs that file on FPI forms must comply with the new Form F-SR disclosure and filing requirements beginning with the first full fiscal quarter that begins on or after April 1, 2024 and the new Form 20-F narrative disclosures relating to the Form F-SR filings starting with the first Form 20-F filed after the FPI's first Form F-SR is filed. For FPIs with a calendar fiscal year, the first Form F-SR will be due on August 14, 2024 (45 days after the end of the second quarter ending June 30, 2024), and the first Form 20-F disclosures related to Form F-SR will be included in the Form 20-F for the fiscal year ending December 31, 2024 due on April 30, 2025. Listed Closed-End Funds must comply with the new rules beginning with the Form N-CSR covering the first six-month period that begins on or after January 1, 2024

(for calendar year Listed Closed-End Funds, the Form N-CSR covering the six months ended June 30, 2024). All other issuers (i.e., domestic filers) must comply with the new rules beginning with the first Form 10-Q or 10-K (for the fourth fiscal quarter) that covers the first full fiscal quarter that begins on or after October 1, 2023. Domestic filers with a calendar fiscal year must comply with the disclosure obligations under the new rules beginning with their annual reports on Form 10-K for the year ending December 31, 2023 (covering the fourth quarter of 2023) due in 2024.

IMPLICATIONS

While the SEC decided not to implement the one-business-day deadline for disclosing the daily repurchase data, the requirement to track and present repurchases on a daily basis will increase the recordkeeping and administrative burdens on issuers and must be integrated into the issuer's disclosure controls and procedures.

Of significant concern to many issuers is the new disclosure requirement to disclose the purpose and structure of the repurchase plans and programs, which is likely to bring increased scrutiny from investors and activists and potentially increased liability if the new disclosures are found to be false or misleading. This has already led to legal challenges to the new rules, as discussed below.

For FPIs, the new rules mark the first time that the SEC has imposed a quarterly reporting requirement. Historically, the SEC has given much deference to home country reporting requirements for FPIs. Recently, however, the SEC has begun to impose on FPIs many of the same disclosure and compliance requirements as apply to domestic issuers, including the recently adopted executive compensation clawback requirements and the proposed climate change and cybersecurity risk disclosure requirements.

LEGAL CHALLENGES

On May 12, 2023, the U.S. Chamber of Commerce, the Texas Association of Business, and the Longview Chamber of Commerce filed a lawsuit with the Fifth Circuit Court of Appeals challenging the new rules under the Administrative Procedure Act and the U.S. Constitution, stating that the SEC's mandatory disclosure requirements "not only risk the public airing of important managerial decisions but also compel speech in violation of the First Amendment." The First Amendment claim is similar to the claim that was used by the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Business Roundtable to challenge the conflict minerals disclosure rules, resulting in a final judgment holding that the requirement for issuers to report to the SEC and post on their website that any of their products "have not been found to be 'DRC conflict free'" violated the First Amendment. The filing of the lawsuit does not stay the implementation of the new SEC rules unless the court specifically issues a stay order. Until the court acts on the petition to modify or set aside the SEC rules in whole or in part, issuers should continue to comply with the new rules as adopted by the SEC.

Capital Markets & Securities Law Watch will monitor developments in this area and will provide updates to our readers as they become available.

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