

May 8, 2023

SEC Adopts New Share Repurchase Disclosure Requirements

On May 3, the SEC [adopted](#) a modified version of its [previously proposed](#) amendments to the rules concerning disclosure of issuer share repurchases. The final rules, while eliminating the previously contemplated next-business-day reporting requirement, will significantly increase issuers' disclosure requirements by requiring both additional quantitative data and narratives relating to the rationale for and goals of the share repurchases. In adopting the rules, the SEC signaled its continued focus on share repurchases, and issuers should begin preparations to comply with the line item requirements and to take account of the SEC's perspective regarding problematic practices in this arena.

The amended rules will require:

*Periodic reporting of share repurchase activity.* The existing requirement to report monthly aggregated repurchase activity in Forms 10-K and 10-Q is being amended to require that those periodic reports disclose *daily* aggregated activity during the relevant quarter (with the disclosure including average price paid per share, among other terms). Repurchases that were intended to qualify for the Rule 10b-18 safe harbor will need to be specifically identified, as will shares repurchased pursuant to a Rule 10b5-1 plan (including the date of adoption or termination of the relevant plan) and the amount that may yet be repurchased under any publicly announced repurchased plans. Note that under the final rules this information will need to be filed with the SEC, rather than furnished, as initially had been contemplated by the SEC.

*Disclosure of insider purchases and sales coincident with repurchase announcements.* The new rules adopt the proposed requirement to indicate via checkbox preceding the above-described tabular disclosures whether any Section 16 insiders purchased or sold shares within four business days before or after the announcement of an issuer share repurchase plan or program (the final rules shortened the relevant period from the initially proposed ten-business-day period).

*Repurchase objectives, rationales, policies and procedures.* Issuers will be required to describe their general approach to share repurchases – including the objectives or rationales for repurchases and the process or criteria used to determine the amount of repurchases – and any policies and procedures relating to (or restrictions on) trading by corporate insiders during a repurchase program. The adopting release notes the SEC's expectation that the disclosure not rely on boilerplate language, and cites approvingly certain examples of useful information that might be included in this regard (including discussion of possible alternative uses for the funds used in the repurchase, the expected impact of the repurchases on the value of the remaining shares, the factors driving the repurchase, and sources of funds for the repurchase, among others).

*Expanded 10b5-1 plan disclosures.* Quarterly disclosure will now be required in periodic reports on Forms 10-Q and 10-K of the issuer's adoption or termination of any Rule 10b5-1 plan, including the material terms of such plan (other than the trading price authorized under such plan). The final rules do not adopt the contemplated parallel disclosure requirements for non-10b5-1 trading arrangements.

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The new rules will become effective 60 days after publication of the adopting release in the Federal Register. All issuers (other than foreign private issuers and certain closed-end funds, which

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will be subject to modified versions of the rules described above) will be required to comply with the new disclosure and related XBRL tagging requirements in their Exchange Act periodic reports beginning with the first filing that covers the full fiscal quarter that begins on or after October 1, 2023 (for fiscal calendar year companies, this will be the 2023 Form 10-K filed in 2024).

The SEC's commentary accompanying the final rules emphasizes the Commission's view that the additional disclosures are necessary and appropriate to allow stockholders to assess the "efficiency of, and motives behind," share repurchases and share repurchase programs. Time will tell whether stockholders and the plaintiffs' bar take this as an invitation to pursue these questions more aggressively and seek to challenge issuer decisionmaking in this area.

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