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# Disclosure Implications of the SEC's Stock Repurchase Amendments

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On May 3, 2023, the Securities and Exchange Commission (the "SEC"), in a 3-to-2 vote, [adopted](#)<sup>1</sup> amendments significantly increasing disclosure requirements for public companies and certain investment companies with respect to repurchases of an issuer's equity securities. The SEC's stated goals of the amendments are to increase transparency of issuer repurchases, reduce information asymmetries between issuers and investors, and enable investors to conduct a more thorough assessment of issuer buybacks, thereby enabling investors to value an issuer's securities more accurately.

## Summary of Amendments and Compliance Dates.

The amendments require the following disclosures for domestic public companies:

- quarterly reporting of historical daily aggregated repurchase activity in an exhibit to Forms 10-K and 10-Q,<sup>2</sup> including repurchases made pursuant to a 10b5-1 trading plan and repurchases intended to qualify for the safe harbor under Rule 10b-18;
- quarterly disclosure in Forms 10-K and 10-Q<sup>3</sup> by checkbox to the repurchase activity exhibit indicating whether any Section 16 officer or director purchased or sold shares that are the subject of an issuer share repurchase plan within four business days before or after the issuer's public announcement of such share repurchase plan;
- quarterly disclosure in Forms 10-K and 10-Q<sup>4</sup> of whether the issuer adopted or terminated any 10b5-1 trading plan and a description of the material terms (other than pricing terms) of any newly-adopted 10b5-1 trading plan;
- quarterly disclosure in Forms 10-K and 10-Q<sup>5</sup> of the objectives or rationales for any share repurchase plan and the process or criteria used to determine the amount of repurchases;
- quarterly disclosure in Forms 10-K and 10-Q<sup>6</sup> of any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restrictions on such transactions; and
- the new disclosures are required to be provided in Inline XBRL format.

Domestic public companies will be required to comply with the new disclosure and interactive tagging requirements in their Forms 10-Q and 10-K (for their fourth fiscal quarter) beginning with the first filing that covers the first fiscal quarter that begins on or after October 1, 2023. Accordingly, for issuers with a calendar fiscal year, their Form 10-K for the fiscal year ending December 31, 2023 will be required to include the new disclosures. FPIs will be required to comply with the new disclosure and interactive tagging requirements beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024, with the new narrative disclosures required in the Form 20-F and the related interactive tagging required for the first Form 20-F filed after the first Form F-SR. Listed Closed-End Funds will be required to comply with the new disclosure and interactive tagging requirements in their Exchange Act periodic reports beginning with the Form NCSR that covers the first six-month period that begins on or after January 1, 2024.

## Background.

Since 2003,<sup>7</sup> public companies have been required to disclose repurchases, aggregated on a monthly basis,<sup>8</sup> in their Forms 10-Q for an issuer’s first three fiscal quarters and in their Forms 10-K for an issuer’s fourth fiscal quarter. FPIs have been required to provide the same disclosure on an annual basis in their Forms 20-F and Listed Closed-End Funds have been required to provide such disclosure on a semi-annual basis in their Forms N-CSR.

The SEC had first [proposed](#)<sup>9</sup> amendments to the share repurchase disclosure requirements in December 2021. The proposed rules, among other things, would have required daily repurchase disclosure on a new Form SR, required to be furnished one business day after execution of a repurchase order. The SEC also had [proposed](#)<sup>10</sup> amendments to Rule 10b5-1 under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) in January 2022. In December 2022, the SEC [adopted](#)<sup>11</sup> amendments to Rule 10b5-1 and related disclosure requirements. As amended, Rule 10b5-1 does not condition<sup>12</sup> the affirmative defense for issuer 10b5-1 trading plans on satisfying any new cooling-off period<sup>13</sup> requirement or being subject to the new restrictions on multiple plans<sup>14</sup> and single trade plans.<sup>15</sup> The SEC also adopted Item 408(a) of Regulation S-K requiring disclosure in Forms 10-Q and 10-K of the adoption or termination of any 10b5-1 or “non-10b5-1” trading plan by any director or Section 16 officer during the last fiscal quarter.<sup>16</sup> The SEC determined, at the time of the 10b5-1 Adopting Release, not to adopt the proposed rule for issuers to make quarterly disclosures of the adoption or termination of trading plans and to consider such disclosure requirements for issuers in the context of the share repurchase rulemaking.

## Disclosure of Share Repurchases.

Domestic public companies with a class of equity securities registered pursuant to Section 12 of the Exchange Act will be required to disclose issuer share repurchases as an exhibit to their Forms 10-Q and 10-K in the following tabular format:

(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 Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans 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	(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)
Total								

FPIs will be required to disclose the same tabular disclosure on new Form F-SR. Listed Closed-End Funds will be required to disclose the same tabular disclosure semi-annually on Form N-CSR.

In a significant change from the proposed rules, the final amendments do not require issuers to provide their daily repurchase disclosures one business day after execution of their share repurchase order.<sup>17</sup> Domestic public companies<sup>18</sup> will be required to disclose their quarterly daily repurchase disclosures in an exhibit to their Forms 10-Q and 10-K (for their fourth fiscal quarter). FPIs<sup>19</sup> will be required to disclose their quarterly daily repurchase disclosures in a new Form F-SR, which will be due 45 days after the end of each of the issuer’s fiscal quarters. Listed Closed-End Funds will be required to disclose daily quantitative repurchase data in their semi-annual and annual reports on Form N-CSR. The final amendments require that the share purchase information be reported

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using Inline XBRL. In another significant change from the proposed rules, the final amendments require that the daily repurchase data be “filed” rather than “furnished.” As a result, the daily repurchase disclosures will be subject to liability under Section 18 of the Exchange Act, and the information will be deemed incorporated by reference into filings under the Securities Act of 1933, as amended, which will be subject to liability under Section 11 of the Securities Act.

The tabular disclosures for domestic public companies, FPIs and Listed Closed-End Funds include a checkbox which is required to be checked if any director or Section 16 officer<sup>20</sup> purchased or sold shares (or other units) that are the subject of a publicly-announced plan or program within four (4) business days<sup>21</sup> before or after the issuer’s announcement of such share repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

A number of commenters on the proposed rules objected to the checkbox requirement on the basis that it could give the incorrect impression that insiders were trading securities because of the announcement when insider sales might have occurred pursuant to pre-arranged 10b5-1 trading plans or pursuant to sell-to-cover sales to fund tax withholding obligations. The SEC notes in the Adopting Release that issuers may include additional disclosures to provide context.<sup>22</sup>

The new tables also require the following additional disclosures:<sup>23</sup>

- the total number of shares (or units) purchased on any day that are intended to qualify for the safe harbor under Rule 10b-18<sup>24</sup> under the Exchange Act;
- the total number of shares (or units) purchased on any day pursuant to a 10b5-1 trading plan; and
- the date any 10b5-1 trading plan was adopted or terminated.

### **Qualitative Disclosures Relating to Share Repurchases**

The final amendments to Item 703 of Regulation S-K (Form 20-F for FPIs and Form N-CSR for Listed Closed-End Funds) require new disclosures<sup>25</sup> that should reference the repurchases included in the tabular daily repurchase disclosures as follows:

- the objectives or rationales for each share repurchase plan or program 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 by its officers and directors during a repurchase program, including any restrictions on such transactions.

With regard to disclosure of the objectives or rationales of each share repurchase plan and the criteria used to determine the amount of repurchases, we expect that there will be a fair amount of commonality in the disclosures, with references to the company’s desire or commitment to return capital to shareholders in a tax-efficient manner, with the amount of repurchases calibrated to a company’s free cash flow.<sup>26</sup> Companies also may need to explain their reasons for certain share withholding.<sup>27</sup>

Insider trading policies restrict trading while in possession of material nonpublic information (“**MNPI**”) and typically would include as a non-exclusive example of MNPI the establishment of a repurchase program. However, most companies do not have formal policies governing insider sales during a repurchase program. Accordingly, companies will need to consider adopting such policies. Practice to address this requirement will evolve, but companies may consider policies that restrict insider sales when sales are not made pursuant to a 10b5-1 trading plan during times when a company is purchasing shares outside of an issuer 10b5-1 trading plan. A more restrictive policy would restrict such sales even if the issuer repurchases are made pursuant to an issuer 10b5-1 trading plan. Other possible restrictions would be for issuers to stay out of the market during times when insider sales are scheduled to be made pursuant to 10b5-1 trading plans. At a minimum, insider sales should never be coordinated with issuer repurchases (for example by the insider using the same broker as the company).

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## New Item 408(d) of Regulation S-K

As noted earlier, the SEC deferred consideration of a proposed rule that would require disclosure by issuers of the adoption or termination of 10b5-1 and “non-10b5-1” trading plans. As part of the share repurchase modernization rulemaking, the SEC adopted new Item 408(d) of Regulation S-K.<sup>28</sup> In changes from the proposed rules, the final rule does not require disclosures with regard to the adoption or termination of “non-10b5-1” trading plans and, in response to commenters’ concerns, specifically excluded pricing terms from the required disclosure.

Item 408(d) requires that issuers disclose in their Forms 10-Q and 10-K, whether during the issuer’s most recently completed fiscal quarter (the issuer’s fourth fiscal quarter in the case of reports on Form 10-K), the issuer adopted or terminated any 10b5-1 trading plan, and provide a description of the material terms of the 10b5-1 trading plan (other than pricing terms), including:

- the date of adoption or termination;
- the duration of the plan; and
- the aggregate number of shares (or units) to be purchased or sold pursuant to the plan.

The disclosure is required to be provided in Inline XBRL format and may cross-reference to disclosure provided pursuant to Item 703 of Regulation S-K if that disclosure satisfies the Item 408(d) requirements.<sup>29</sup>

## Impact of New Disclosure Requirements

The SEC states that the additional required disclosures will provide investors with enhanced information to assess the purposes and effects of repurchases, including whether those repurchases may have been taken for reasons that may not increase an issuer’s value.<sup>30</sup> For example, disclosures of daily repurchase data and qualitative disclosures may enable investors to conclude that management may have timed share repurchases in order to meet certain earnings goals or targets, to support insiders’ trading positions or to otherwise increase insider compensation. Further, the additional disclosures are intended to enable investors to determine whether repurchases occurred at a time when the decision makers were aware of MNPI. On the other hand, the statement of the dissenting Commissioners acknowledges that not all share repurchases may be efficient and undertaken with pure motives but notes that requiring companies to “describe in painstaking detail every corporate action risks creating white noise, the contextless volume of which could confuse investors.”<sup>31</sup> Similarly, as reported by *The Wall Street Journal*, prominent executives, industry-specific groups and companies have expressed skepticism regarding the efficacy of the rule amendments. For example, PNC expressed concern that some of the specific aspects of the rule amendments may have “unintended or undesirable side effects that outweigh whatever benefits they offer,” such as requiring disclosure that allows investors to anticipate repurchases.<sup>32</sup> This view was echoed by the Business Roundtable, which stated that the “extensive mandates in the final rule remain overly complicated and burdensome.”<sup>33</sup> It remains to be seen whether the rule amendments will have the intended effects of reducing information asymmetries and enabling investors to better assess issuer share repurchases or whether the unintended effects and costly implementation will overshadow the benefits to investors.

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## References

- 1 *Share Repurchase Disclosure Modernization*, Release Nos. 34-97424; IC-34906 (May 3, 2023) (the “**Adopting Release**”).
- 2 Foreign private issuers (“**FPIs**”) are required to disclose historical daily repurchase activity on a new Form F-SR. Registered closed-end management investment companies that are exchange-traded (“**Listed Closed-End Funds**”) are required to disclose historical daily repurchase activity on a semi-annual basis in their Forms N-CSR.
- 3 FPIs are required to disclose this information in their Forms F-SR and Listed Closed-End Funds are required to disclose this information semi-annually in their Forms N-CSR. For FPIs, the checkbox requirement applies to any director or member of senior management required to be identified in the issuer’s Form 20-F.
- 4 FPIs and Listed Closed-End Funds are not subject to this disclosure requirement.
- 5 FPIs are required to disclose this information annually in their Forms 20-F and Listed Closed-End Funds are required to disclose this information semi-annually in their Forms N-CSR.
- 6 FPIs are required to disclose this information annually in their Forms 20-F and Listed Closed-End Funds are required to disclose this information semi-annually in their Forms N-CSR.
- 7 See Item 703 of Regulation S-K. *Purchases of Certain Equity Securities by the Issuer and Others*, Release No. 33-8335 (Nov. 10, 2003).
- 8 Issuers are required to disclose in tabular format (i) the total number of shares (or units) purchased, (ii) the average price paid per share (or unit), (iii) the total number of shares (or units) purchased as part of publicly announced plans or programs, and (iv) the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs. Footnote disclosure is required to disclose the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company’s obligations upon exercise of outstanding put options issued by the company, or other transactions). Footnote disclosure also is required to disclose (a) the date each plan or program was announced, (b) the dollar amount (of share or unit amount) approved, (c) the expiration date (if any) of each plan or program, (d) each plan or program that has expired during the period covered by the table, and (e) 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.
- 9 *Share Repurchase Disclosure Modernization*, Release Nos. 34-93783; IC-34440 (Dec. 15, 2021).
- 10 *Rule 10b5-1 and Insider Trading*, Release Nos. 33-11013; 34-93782 (Jan. 13, 2022).
- 11 *Insider Trading Arrangements and Related Disclosures*, Release Nos. 33-11138; 34-96492 (Dec. 14, 2022) (the “**10b5-1 Adopting Release**”).
- 12 For additional discussion, see our Client Alert, [SEC Adopts Amendments to Rule 10b5-1 and Related Disclosure Requirements](#) (Feb. 8, 2023).
- 13 See Rule 10b5-1(c)(ii)(B)(1) and (2). A “cooling-off period” is a minimum waiting period between the adoption of a Rule 10b5-1 trading plan and the date on which trading under the plan may commence. The SEC had proposed a shorter cooling-off period of 30 days for issuers. Although the SEC did not adopt a cooling-off period for issuers, the SEC stated in the 10b5-1 Adopting Release that the adoption of a cooling-off period for issuers warranted further consideration, noting also that “... a corporation is considered an insider with regard to its duty to either disclose or abstain when purchasing its own shares on the basis of material, nonpublic information.”
- 14 See Rule 10b5-1(c)(ii)(D). Subject to certain exceptions, Section 16 officers (i.e., “officers” as defined in Rule 16a-1(f) under the Exchange Act), directors, and other persons (other than the issuer) may not enter into or have outstanding another 10b5-1 trading plan that would cover purchases or sales of any class of securities in the open market. The SEC stated in the 10b5-1 Adopting Release that the applicability of the restriction on multiple 10b5-1 trading plans for issuers warranted further consideration.
- 15 See Rule 10b5-1(c)(ii)(E). Subject to exceptions for eligible sell-to-cover trading plans, Section 16 officers, directors, and other persons (other than the issuer) also may not enter into a plan designed to effect the open-market purchase or sale of the total number of securities covered by the plan in a single transaction if such person has entered into a similar plan within the prior 12-month period. The SEC stated in the 10b5-1 Adopting Release that the applicability of the restriction on single trade plans for issuers warranted further consideration.
- 16 See Item 408(a) of Regulation S-K. Required disclosures include whether the trading plan is intended to satisfy the affirmative defense of Rule 10b5-1(c) and the material terms of the plan (other than price), such as (i) the name and title of the director or Section 16 officer, (ii) the adoption or terminate date of the plan, (iii) the duration of the plan, and (iv) the aggregate number of shares to be purchased or sold pursuant to the plan. For purposes of these disclosures, a “non-10b5-1 trading plan” is a contract, instruction, or plan for the purchase or sale of securities not intended to satisfy the conditions of Rule 10b5-1, where (a) the Section 16 officer or director asserts at the time of adoption that she or he was not aware of material nonpublic information, and (b) the plan specified the amount, date, and pricing (or methodology or didn’t permit any influence by the covered person) for the purchase or sale in the manner required for a 10b5-1 trading plan.
- 17 In the Adopting Release, the SEC noted that periodic reporting versus daily reporting addressed commenters’ concerns that daily reporting would result in significant additional reporting costs to issuers, potential misinterpretation of an issuer’s day-to-day changes in trading activity that would cause stock price volatility which would allow other market participants to trade strategically and harm investors, and disruption of confidential merger discussions. Further, because issuers already report share repurchases on a monthly basis, the SEC believes that the costs to issuers of providing daily repurchase activity in their periodic reports (or Form F-SR for FPIs) would be incremental.
- 18 Smaller reporting companies and emerging growth companies are subject to the amended rules.
- 19 Canadian FPIs that report on the Multijurisdictional Disclosure System (“**MJDS**”) forms are not subject to the reporting requirements. (See the Adopting Release, at note 219).
- 20 FPIs’ directors and officers are not subject to reporting under Section 16 of the Exchange Act (see Rule 3a12-3 under the Exchange Act). For FPIs, the checkbox requirement applies to any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F.
- 21 The proposed rules had provided for a period of ten (10) business days.
- 22 The SEC further noted that such additional disclosure might be required if necessary to prevent the disclosures from being misleading.
- 23 In the Adopting Release, the SEC notes that additional disclosures would be required if necessary to make the disclosures not misleading. See Rule 12b-20 under the Exchange Act.
- 24 Rule 10b-18 provides issuers with a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b) under the Exchange Act when they repurchase their common stock in the market in accordance with the rule’s manner, timing, price, and volume conditions. The rule does not provide any exemption from the antifraud provisions of the securities laws.
- 25 The disclosures are required to be provided in an Interactive Data File.
- 26 In the Adopting Release, the SEC states that issuers may avoid boilerplate disclosure by discussing other possible ways to use the funds allocated for the repurchase and comparing the repurchase with other investment opportunities that would ordinarily be considered by the issuer, such as capital

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expenditures and other uses of capital, whether the issuer believes its stock is undervalued, whether prospective internal growth opportunities are economically viable, and whether the valuation for potential targets is attractive.

- 27 The Staff's position is that shares withheld for taxes upon vesting of restricted stock (as opposed to restricted stock units or upon the net exercise of options) is subject to reporting under Item 703 of Regulation S-K. With regard to shares withheld which are not subject to reporting under Item 703, many companies include disclosure regarding shares withheld for taxes.
- 28 There is no corresponding disclosure requirement for FPIs or Listed Closed-End Funds.
- 29 Disclosure is required under Item 703 if an issuer conducted a share repurchase in the prior fiscal quarter. Disclosure is required under Item 408(d) if an issuer adopts or terminates a 10b5-1 trading plan, regardless of whether a share repurchase transaction pursuant to that plan actually occurred during the prior fiscal quarter that is covered in the Form 10-Q or Form 10-K (for the issuer's fourth fiscal quarter).
- 30 The SEC notes that repurchases are often employed in a manner that may be aligned with shareholder value maximization, including the efficient return of capital to shareholders, providing liquidity or price support and mitigating dilution. In addition repurchases can provide a credible signal of the issuer's view that its stock is undervalued. The SEC also notes that repurchases may be motivated by "suboptimal" reasons including to reach earnings per share or stock price targets to achieve executive compensation payouts or to temporarily increase the stock price in coordination with insider sales.
- 31 See *No Repurchase Left Behind: Dissenting Statement on Share Repurchase Modernization Rule*, May 3, 2023.
- 32 See *SEC Buyback-Disclosure Rule Stirs Worry Over Costs and Compliance*, Wall St. Journal, May 5, 2023.
- 33 See *id.*

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