

FPI Alert: SEC Amends Rules Requiring Disclosures of Issuer Share Repurchases

On May 3, 2023, in a 3-2 vote, the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) adopted final rules (the “Final Rules”)¹ which add or update a number of disclosure requirements relating to an issuer’s repurchase of its registered equity securities. The Commission had proposed amendments to its share repurchase disclosures (the “Proposal”) on December 15, 2021.

For foreign private issuers (“FPIs”) that report on Form 20-F, the Final Rules create a new quarterly Form F-SR to be used to disclose on a quarterly basis daily data about the issuer’s repurchases during the quarter. Additionally, the Final Rules replace the existing requirement in Item 16E of Form 20-F to disclose issuer repurchase data for the year on a monthly basis with extensive new narrative disclosure about the issuer’s share repurchase programs, including the rationales behind and objectives of any share repurchases and the process or criteria used in determining the amount of repurchases.

Filing of the new Form F-SR will be due 45 days after the end of each fiscal quarter. All information disclosed pursuant to amended Item 16E of Form 20-F and new Form F-SR must be tagged in Inline XBRL.

For FPIs that elect to report on the periodic forms used by domestic U.S. issuers (Forms 10-Q and 10-K), those new requirements are addressed in more detail in our separate memo, [SEC Amends Rules Requiring Disclosures of Issuer Share Repurchases](#).

KEY FEATURES OF THE NEW RULES

Compliance Dates

FPIs that report on Form 20-F will be required to begin filing Form F-SR on a quarterly basis for the first full fiscal quarter that begins on or after April 1, 2024. For FPIs with a calendar year end, filing of a Form F-SR will be required for the quarter ending June 30, 2024, and will be due within 45 days of the end of the quarter, or by August 14, 2024. The new Form 20-F narrative disclosure will be required starting with the first Form 20-F filed after an FPI’s first Form F-SR was due.

Required Quarterly and Annual Disclosures

TABULAR DISCLOSURES IN NEW FORM F-SR.

On a quarterly basis, FPIs must disclose the total repurchases made each day during the quarter in a table on new Form F-SR.² The Proposal had contemplated such disclosures being made one business day following any repurchase, but the Commission acknowledged the concerns from many commenters (including Cravath) about the extensive challenges presented by substantially real-time disclosure. In response, the Final Rules reflect a regime of daily data disclosed quarterly.

The new table must use the following format:

(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)

In a footnote to the table, the FPI must also disclose the date that any Rule 10b5-1 trading plan identified in column (i) was adopted or terminated.

To the extent that FPIs do not rely on the safe harbor of Rule 10b-18 or the affirmative defense provided by Rule 10b5-1 for the repurchases they conduct outside the United States and such issuers are concerned about any negative inferences from those columns being blank, the Commission noted in the Adopting Release that issuers may include additional disclosure explaining why they chose not to rely on those provisions.

The Final Rules also include a checkbox before the daily quantitative share repurchase table which will indicate whether any of the FPI's directors or members of senior management who would be identified pursuant to Item 1 of Form 20-F³ purchased or sold shares of the issuer's equity securities within four business days before or after the issuer's announcement during the covered quarter of a repurchase plan. For the purposes of filling out this new checkbox, FPIs may rely on written representations from directors and senior management, provided that the reliance is reasonable.

NEW NARRATIVE DISCLOSURES ABOUT FPI REPURCHASES IN FORM 20-F.

The Final Rules amend the disclosure requirements in Item 16E of Form 20-F to require FPIs to disclose

the following with respect to the particular repurchases disclosed in the FPI's Form F-SRs:

- the objectives or rationales for its share repurchases and the process or criteria used to determine the amount of repurchases;⁴ and
- any policies and procedures relating to purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any restriction on such transactions.

Additionally, the Final Rules further amend Item 16E of Form 20-F to move certain disclosures that are currently in the footnotes of the monthly quantitative share repurchase table to the narrative discussion, as the monthly table will no longer be required in light of the new daily quantitative share repurchase disclosure that must be provided on Form F-SR each quarter. Those continuing disclosures include:

- 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;
- each plan or program that has expired during the period covered by the share repurchase table; 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.

Analysis and Recommendations

Although many public companies and their advisors are rightfully relieved that the Commission did not adopt its proposed version of Form SR⁵ that would have required issuers (including FPIs) to report daily share repurchases on the first business day following the day that shares were repurchased, the Final Rules nevertheless represent a meaningful increase in the disclosure burden facing FPIs. We note too that while the proposed Form SR would have been furnished and not filed, the SEC expressly rejected that approach in the Final Rule, concluding that:

the liability concerns that may have been raised by a requirement to file daily repurchase data within the proposed one business day timeframe are alleviated. The issuer will have more time to obtain, verify, and compile the disclosure compared to the proposal. As a result, we find it appropriate for issuers to be subject to Exchange Act Section 18 liability for the new repurchase disclosure, as they are currently for filings under Item 703 of Regulation S-K, and the information will be deemed incorporated by reference into filings under the Securities Act, which will be subject to Securities Act Section 11 liability.

DISCLOSURE CONTROLS AND PROCEDURES.

The Commission's statement is a pointed reminder that issuers will need to evaluate and update as appropriate their disclosure controls and procedures to ensure that information required to be disclosed is recorded, processed, summarized and reported in a timely manner. We understand that most issuers who have formal share repurchase programs, whether designed to comply with one or both of Rule 10b-18 or Rule 10b5-1, typically contract with only one broker-dealer to manage those plans or programs. We anticipate that in light of the Final Rules, broker-dealers will update and enhance their own recordkeeping and communication practices to help ensure that their clients are receiving complete, accurate and timely information, but issuers should initiate conversations, and review their contracts, with their broker-dealers soon to satisfy themselves that appropriate processes are in place. Calendar year

FPIs will need to have daily trade information on hand starting with any repurchases made on or after April 1, 2024.

BOARD EDUCATION.

The Final Rules require new disclosures about the rationales and objectives of the issuer's share repurchases. Not surprisingly, the SEC has indicated that it will look unfavorably on disclosures that devolve into boilerplate and provided a non-exclusive range of possible discussion items that may be appropriately addressed, including:

- comparing the repurchase with other investment opportunities that would ordinarily be considered by the issuer, such as capital expenditures and other uses of capital;
- the expected impact of the repurchases on the value of remaining shares;
- the factors driving the repurchase, including whether the issuer considers its stock to be undervalued; and
- the sources of funding for the repurchase, where material, such as, for example, in the case where the source of funding results in tax advantages that would not otherwise be available for a repurchase.

Issuers might also consider and discuss how share repurchases intersect with the issuer's compensation plans and the implications for anticipated capital raising.

Companies should make sure that their directors receive a full briefing in the coming months on these new rules and the upcoming disclosure requirements. Boards presumably will want to reflect thoughtfully on the rationales and objectives for any share repurchases and may wish to be involved in the issuer's disclosure of the same. Corporate secretaries and legal teams may also wish to revisit their practices around minutes and resolutions related to repurchases in order to appropriately document the deliberations that will support these disclosures. Issuers should also educate their directors and members of senior management about the new checkbox requirement and the potential that any issuer's repurchase activity that coincides with director or senior management sales may be perceived negatively and scrutinized by investors, proxy advisors and potential shareholder proponents.

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- 1 The text of the Final Rules and the Commission's related adopting release (the "Adopting Release") can be found on the SEC's website at <https://www.sec.gov/rules/final/2023/34-97424.pdf>.
 - 2 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.
 - 3 For FPIs that elect to report using Forms 10-Q and 10-K and will not file Form F-SR, the corresponding checkbox on those forms will nevertheless refer to "any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F".
 - 4 The Commission acknowledged that some commenters had substantial concerns about this new disclosure when it was proposed and noted in the Adopting Release that "[a]lthough the disclosures required by the final amendments should convey a thorough understanding of the issuer's objectives or rationales for the repurchases, and the process or criteria it used in determining the amount of the repurchase, the final amendments do not require issuers to provide disclosure at a level of granularity that would reveal any competitive or sensitive information beyond what may already be gleaned from other disclosures regarding the business and financial condition of the issuer". It remains to be seen what disclosures the new rule will provoke and if the Commission has successfully threaded this needle.
 - 5 The new form was originally designated as "Form SR" but since under the final rules it may be filed only by FPIs, it was redesignated as "Form F-SR".

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