

SEC Amends Rules Requiring Disclosures of Issuer Share Repurchase and Rule 10b5-1 Plans

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, 2021.²

The Final Rules replace the current requirements in Item 703 of Regulation S-K that domestic U.S. issuers disclose in their periodic reports repurchase data for the quarter on a monthly basis with extensive new quantitative and qualitative disclosures about issuer repurchases including:

1. daily quantitative data about the issuer’s repurchases during the most recently ended quarter;
2. 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; and
3. disclosure regarding an issuer’s adoption or termination of Rule 10b5-1 trading plans.

For domestic U.S. issuers, these disclosures will appear in periodic reports on Form 10-Q or, for the fourth quarter, Form 10-K. The Final Rules will also require foreign private issuers (“FPIs”), other than Canadian issuers that report pursuant to the MJDS disclosure system, to provide similar quarterly disclosures in a report on new Form F-SR which will be due within 45 days after the end of the fiscal quarter. The FPI requirements are addressed in more detail in our separate memo, [FPI Alert: SEC Amends Rules Requiring Disclosures of Issuer Share Repurchase and Rule 10b5-1 Plans](#).

KEY FEATURES OF THE NEW RULES

Compliance Dates

Domestic U.S. issuers will be required to comply with the new disclosure requirements, including mandatory tagging using Inline XBRL, in their periodic reports on Forms 10-K and 10-Q beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For issuers with a calendar year end, compliance will be required beginning with their Annual Report on Form 10-K for the year (fourth quarter) ended December 31, 2023, which will be due either on February 29, 2024, or in March 2024, depending on the issuer’s accelerated filing status.³ For issuers with a September 30 fiscal year end, compliance will be required with their Quarterly Report on Form 10-Q for their fiscal first quarter ended December 31, 2023, which will be due by February 9, 2024, for accelerated filers and large accelerated filers and by February 14, 2024, for non-accelerated filers.

Required Quarterly Disclosures

NEW TABULAR DISCLOSURES.

On a quarterly basis, issuers must disclose the total repurchases made each day during the quarter in a table filed as an exhibit to their Form 10-Q or Form 10-K. The Proposal had contemplated disclosures

being made on a new Form SR 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 issuer must also disclose the date that any Rule 10b5-1 trading plan identified in column (i) was adopted or terminated.

The Final Rules also require a checkbox before the daily quantitative share repurchase table indicating whether any of the issuer’s directors or officers (subject to Section 16 reporting) had purchased or sold shares of the issuer’s equity securities within the period four business days before or after the issuer’s announcement of a repurchase plan during the quarter covered by the report.⁴ Issuers may rely on the Section 16 reports filed by their officers and directors for the purposes of this new checkbox.

The Final Rules also require a checkbox before the daily quantitative share repurchase table indicating whether any of the issuer’s directors or officers (subject to Section 16 reporting) had purchased or sold shares of the issuer’s equity securities within the period four business days before or after the issuer’s announcement of a repurchase plan during the

quarter covered by the report. Issuers may rely on the Section 16 reports filed by their officers and directors for the purposes of this new checkbox.

NEW NARRATIVE DISCLOSURES ABOUT ISSUER REPURCHASES.

The Final Rules amend the disclosure requirements in Item 703 of Regulation S-K to require an issuer to disclose the following:

- the objectives or rationales for its share repurchases and the process or criteria used to determine the amount of repurchases;⁵ 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 S-K Item 703 to move certain disclosures that are currently in the footnotes of the existing 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 exhibit. 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.

NEW NARRATIVE DISCLOSURES ABOUT ISSUER 10B5-1 PLANS.

New Regulation S-K Item 408(d) will require disclosure as to whether, during its most recently completed fiscal quarter, the issuer adopted or terminated a Rule 10b5-1 trading plan⁶. Additionally, the issuer will need to provide a description of the material terms of the Rule 10b5-1 trading plan, including the date on which the plan was adopted or terminated, the duration of the plan and the aggregate number of securities to be purchased pursuant to the plan. The disclosure mandated by Item 408(d) will need to be tagged in Inline XBRL, just like the tabular and other disclosures mandated by the revisions to S-K Item 703.

Analysis and Recommendations

Although many public companies and their advisors are rightfully relieved that the Commission did not adopt its proposed Form SR that would have required issuers 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 public companies. 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. However, issuers should initiate conversations, and review their contracts, with their broker-dealers soon regarding the sufficiency of the processes that are in place. Calendar year issuers will need to have daily trade information on hand starting with any repurchases made on or after October 1, 2023.

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 Section 16 officers about the new checkbox requirement and the potential that any issuer repurchase activity that coincides with director or Section 16 officer sales may be perceived negatively and scrutinized by investors or proxy advisors and other third-party commenters.

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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 Public comments had initially been due by April 1, 2022. On December 7, 2022, however, the Commission reopened the comment period on the Proposal until January 11, 2023, in light of the enactment of the Inflation Reduction Act of 2022 which imposes upon certain corporations a non-deductible excise tax on issuer repurchases.
 - 3 Foreign private issuers 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.
 - 4 As noted by the Commission in the Adopting Release, "[i]f an issuer has multiple classes of stock, each with its own repurchase plan, the issuer is required to check the box in its periodic report if, during that period, a covered officer or director purchases or sells shares or other units of the class of the issuer's equity securities that is the subject of any issuer share repurchase plan or program within four business days before or after the issuer's announcement of such repurchase plan or program. Additionally, the issuer is required to check the box in its periodic report if, during that period, it announced an increase of an existing share repurchase plan because the announcement constitutes a new repurchase plan for purposes of the requirement."
 - 5 The Commission acknowledged that some commenters had substantial concerns about this new disclosure. The Adopting Release states 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.
 - 6 This disclosure is similar to the disclosures required by Item 408(a) of Regulation S-K for directors and Section 16 officers.

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