

# SEC Adopts Share Repurchase Disclosure Rules

May 12, 2023

On May 3, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted rules requiring additional disclosures by issuers of repurchases of equity securities registered under Section 12 of the Exchange Act made by or on behalf of the issuer or by any “affiliated purchaser” of the issuer.<sup>1</sup> Most significantly, the rules require:

- most issuers to disclose their daily share repurchase activity on a quarterly basis;
- additional disclosures in periodic reports regarding the objective and structure of an issuer’s repurchase program, including Rule 10b5-1 trading arrangements, and policies relating to trading activity by officers and directors during repurchase programs; and
- issuer periodic reports to identify trading activity by officers and directors in close proximity to an announcement of a share repurchase program.

The key provisions of the rules are discussed below. The full text of the rules is available [here](#).

For most issuers, the rules apply beginning with the first periodic report on either Form 10-Q or Form 10-K in respect of the first full fiscal quarter that begins on or after October 1, 2023. The quarterly reporting requirements for foreign private issuers (“FPIS”) will apply beginning with the first full fiscal quarter that begins on or after April 1, 2024, using the new Form F-SR, while the annual reporting requirements will apply beginning with the first Form 20-F filing after the first Form F-SR is filed. For

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<sup>1</sup> An “affiliated purchaser” is any: (i) person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer’s securities; or (ii) affiliate who, directly or indirectly, controls the issuer’s purchases of such securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer; but does not include a broker, dealer or other person solely by reason of such broker, dealer or other person effecting Rule 10b-18 purchases on behalf of the issuer or for its account, or any officer or director of the issuer solely by reason of that officer or director’s participation in the decision to authorize Rule 10b-18 purchases by or on behalf of the issuer.

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listed closed-end funds, the rules will apply beginning with the Form N-CSR for the first six-month period that begins on or after January 1, 2024.

**Background.** Currently, issuers are required to disclose share repurchases in their periodic reports on Form 10-K and Form 10-Q or Form 20-F. The repurchase data is required to be aggregated on a monthly basis, with footnote disclosure of detailed information concerning all issuer share repurchase plans or programs (whether or not conducted pursuant to Rule 10b5-1, Rule 10b-18, or otherwise). In addition, issuers typically publicly announce the adoption of a repurchase plan or program through a press release or Form 8-K so that the existence of the plan is not material nonpublic information (MNPI).

While the SEC acknowledged in the adopting release that share repurchases are generally implemented for legitimate business reasons, *e.g.*, reducing dilution from equity incentive plan issuances, the SEC expressed concerns about the use of share repurchases for earnings management or to increase management's compensation. The new rules seek to address these concerns by providing investors with additional information to help investors better understand the extent of an issuer's activity in the market and an issuer's motivation for share repurchases, and to allow investors to gather knowledge about the potential relationship between executive compensation, stock sales, and share buybacks.

**Daily Repurchase Disclosure.** The new rules require issuers to disclose daily share repurchase information in quarterly reports, in contrast to the aggregate monthly reporting currently required. For most issuers, the daily repurchase information will be presented in an exhibit to Form 10-Q and Form 10-K (for an issuer's fourth fiscal quarter), instead of in the body of those reports. For FPIs that file annual reports on Form 20-F, the information is to be disclosed on a new Form F-SR, due 45 days after each fiscal quarter of the issuer. Currently, these FPIs report monthly repurchase data on an annual basis, on Form 20-F. For listed, closed-end funds, the share repurchase information is to be disclosed in semiannual reports on Form N-CSR.

The repurchase data to be aggregated daily and disclosed, quarterly or semiannually, must include the following, in tabular format:

- the number of shares repurchased by or on behalf of the issuer or any affiliated purchaser;
- the average price per share paid;
- total number of shares purchased as part of publicly announced plans or programs;

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- the maximum number (or approximate dollar value) of shares that may yet be repurchased under the publicly announced plans or program;
  - number of shares repurchased on the open market;
  - the number of shares intended to qualify for the Rule 10b-18 non-exclusive safe harbor; and
  - the number of shares repurchased pursuant to a Rule 10b5-1 plan.<sup>2</sup>

In addition, issuers are required to disclose, by footnote to the daily repurchase table, the date any plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), pursuant to which shares were repurchased, was adopted or terminated. The tabular repurchase disclosure must also be filed, rather than furnished with the SEC.

While incremental to the current reporting obligations for issuer share repurchases, the new rules represent a significant departure from the proposed rules, which would have required reporting of share repurchases one business day after execution.

**Expanded Narrative Disclosures.** The new rules also amend Item 703 of Regulation S-K to require additional narrative disclosures by issuers in periodic reports on Form 10-Q and Form 10-K regarding share repurchase programs and policies, including:

- the objectives or rationales for its share repurchases, and the process or criteria employed to determine the amount of repurchases;
- any policies or procedures relating to purchases and sales of the issuer's securities by its directors and officers during a repurchase program, including any restrictions on such transactions; and
- the number of shares purchased other than through a publicly announced plan or program, and the nature of the repurchase transactions (*e.g.*, whether the purchases were made in open market transactions, tender offers, etc.).

FPIs and closed-end funds are subject to the same disclosure requirements in connection with their reports on Form 20-F and Form N-CSR, respectively.

**Checkbox Disclosure for Director and Officer Trades.** An issuer will also now be required to disclose in its periodic reports (by checking a box) whether any of its

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<sup>2</sup> See also the Debevoise Client Update regarding the SEC adopting significant amendments regarding Rule 10b5-1 trading plans and related disclosures, available [here](#).

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directors and Section 16 officers purchased or sold equity securities of any class registered under Section 12 of the Exchange Act that are part of an issuer share repurchase plan or program (whether or not conducted pursuant to Rule 10b5-1, Rule 10b-18, or otherwise) within four business days before or after the announcement of a repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program. In satisfying this disclosure obligation, pursuant to a new Item 601(b)(26) of Regulation S-K, issuers may rely on Section 16 reports filed by their officers and directors for determining whether the box should be checked, unless it knows or has reason to believe that a filing was not accurately or timely made. Closed-end funds may similarly rely on Section 16 reports, pursuant to a new Item 14(a)(iii) of Form N-CSR. For FPIs, the checkbox requirement applies to any director or senior management member who is identified in Item 1 of Form 20-F. The adopting release makes clear that even trades made by officers and directors that qualify for the affirmative defense under Rule 10b5-1 could trigger the checkbox requirement.

**Quarterly Disclosure of Issuer 10b5-1 Trading Plans.** The SEC adopted a new Item 408(d) of Regulation S-K, which will require issuers (other than FPIs) to disclose any adoption or termination of a contract, instruction, or written plan to purchase or sell its own securities that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). The disclosures would be included in an issuer's periodic reports on Form 10-Q and Form 10-K in respect of plan adoptions or terminations occurring in such fiscal quarter. The rules also require the following details regarding an issuer's trading plan intended to comply with Rule 10b5-1(c):

- the adoption or termination date of the trading plan;
- the trading plan's duration; and
- the total number of securities to be purchased or sold pursuant to the trading plan.

Unlike the proposed rule, new Item 408(d) will not apply to plans not intended to satisfy Rule 10b5-1(c), nor will it require disclosure of the price at which the executing party is authorized to trade.

**Inline XBRL Tagging.** The new rules also require issuers to apply Inline XBRL to tag information disclosed pursuant to Items 601(b)(26) and 703 of Regulation S-K, Item 16E of Form 20-F and Form F-SR. This aligns with the current mandate for financial statements.

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We would be happy to discuss these new rules and the related required disclosures with any issuer. Please do not hesitate to contact us with any questions.

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