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Legal Update

SEC Proposes New Share Repurchase Disclosure Rules

Background

On December 15, 2021, the U.S. Securities and Exchange Commission (the "SEC") issued proposed amendments (the "Proposed Amendments") to its existing rules (the "Existing Rules") regarding disclosures about purchases of an issuer's equity securities by or on behalf of the issuer or an affiliated purchaser, commonly referred to as "buybacks."[1] The Proposed Amendments would apply to issuers that repurchase securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), including foreign private issuers and registered closed-end investment management companies ("registered closed-end funds").

An issuer may undertake repurchases through a number of methods, including through open market purchases, tender offers, privately negotiated repurchases or an accelerated share repurchase program. The SEC proposing release noted that investors and other market participants ordinarily become aware of a buyback only when it is reported by the issuer in its public filings, which are often filed months after the trades have been executed. At present, these filings are not required to, and typically do not, disclose the specific dates on which buybacks pursuant to an announced repurchase plan or program will be executed. The Proposed Amendments would increase the frequency of reporting and the amount of information required with respect to buybacks.

The following table summarizes the Proposed Amendments compared to the Existing Rules:

		Existing Rules	Proposed Amendments
I. Disclosure Requirements			
a	Total number of shares repurchased	Disclose in periodic filings, reported month by month for each month covered by the periodic filing.	New requirement to disclose this information in new Form SR for each buyback transaction. Disclose in periodic filings, reported month by month for each month covered by the periodic filing.
b	Average price paid per share	Required.	Required. New requirement to disclose this information in new Form SR for each buyback transaction.

		Existing Rules	Proposed Amendments
c	Total number of shares repurchased as part of publicly announced plan or program	Required.	Required. New requirement to disclose in periodic filings whether buyback was made in reliance on the safe harbor in Exchange Act Rule 10b-18 and/or a plan intended to meet the affirmative defense conditions in Exchange Act Rule 10b5-1(c). New requirement to disclose this information in new Form SR for each buyback transaction.
d	Maximum number of shares that may yet be purchased under plans or programs	Required.	Required.
e	Objective or rationale for the buyback and process/criteria used to determine repurchase amounts	Not required.	Required.
f	Policies and procedures relating to buybacks by officers and directors	Not required.	Required.
g	Whether buyback was made pursuant to a plan satisfying Rule 10b5-1(c) affirmative defense	Not required.	Required.
h	Whether buyback was made in reliance on Rule 10b-18 non-exclusive safe harbor	Not required.	Required.
i	Footnote disclosure of principal terms of buyback transaction	Required.	Required, plus disclose material errors or changes to information previously reported on Form SR.
II. Timing of Disclosure			
a	Periodic disclosure of buybacks in public filings (e.g., 10-Q, 10-K)	Required. Frequency depends on type of issuer and form used.	Required. Frequency depends on type of issuer and form used.
b	Buybacks disclosed on a daily basis	Not required.	New Form SR requires buybacks to be disclosed one business day after execution of the buyback order (the trade date).
III. Mode of Disclosure			
a	Machine readable data language required	Issuer can disclose using non-machine readable data languages (e.g., ASCII or HTML).	Issuer must use machine-readable data language (Inline XBRL).

Proposed Amendments to Buyback Disclosure Requirements

The summary table indicates the information that issuers are required to disclose under the Existing Rules. The Proposed Amendments would add, as summarized above, additional disclosure requirements. Below, we discuss certain of these proposed additional requirements in more detail.

Affirmative Defense to Insider Trading – Exchange Act Rule 10b5-1(c). Exchange Act Rule 10b5-1(c) provides an affirmative defense to insider trading allegations relating to an insider's purchase of securities, so long as that purchase is pursuant to a "contract, instruction, or plan." An issuer's buyback plan must conform to the requirements of Rule 10b5-1 in order for an issuer to assert this defense. Under the Existing Rules, there is no additional disclosure required for trades made subject to such a plan. The Proposed Amendments introduce a new requirement that an issuer that intends to conduct a buyback transaction pursuant to a Rule 10b5-1 plan must now disclose (i) in Form SR, the aggregate total number of shares purchased in reliance on the plan and (ii) in the issuer's periodic filings, whether the issuer is making its repurchases pursuant to a plan that meets the conditions of Rule 10b5-1(c).

Safe Harbor for Common Stock Repurchases – Exchange Act Rule 10b-18. Exchange Act Rule 10b-18 provides conditions which, if met, provide a safe harbor for repurchases of common stock. Under the Existing Rules, repurchases made pursuant to Rule 10b-18 must be disclosed in the issuer's periodic filings, including Form 10-Q and Form 10-K. Under the Proposed Amendments, the issuer would also need to disclose (i) in Form SR, the aggregate total number of shares repurchased pursuant to Rule 10b-18 and (ii) in its periodic filings, whether the issuer intends for its buybacks to satisfy the conditions of Rule 10b-18.

Objective or rationale for the buyback and policies and procedures for issuer's directors and officers. Under the Proposed Amendments, an issuer would need to disclose in its periodic reports both (i) the objective or rationale for the buyback and the process or criteria used to determine the repurchase amounts and (ii) any policies and procedures relating to purchases and sales of the issuer's securities by its directors and officers during a repurchase program, including any restriction on such transactions.

Disclosure of principal terms of buyback transaction. The Existing Rules already require footnote disclosure of the principal terms of all publicly announced repurchase plans or programs, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction. The Proposed Amendments would continue to require this information to be disclosed in either a footnote or an accompanying narrative, along with expanding this disclosure requirement to include the information discussed in the preceding paragraph. In addition, issuers would be required to furnish an amended Form SR to disclose material errors or changes to information previously reported on Form SR.

Furnishing of Form SR. The Proposed Amendments would require issuers to furnish, rather than file, Form SR, meaning that issuers would not be subject to liability for misleading statements under Section 18 of the Exchange Act, and information disclosed in Form SR would not be incorporated by reference into filings under the Securities Act of 1933.

Proposed Amendments on Buyback Disclosure Timing

One Business Day disclosure under Form SR. Under the Existing Rules, issuers are required to disclose buybacks in their periodic reports. For Section 12 issuers, any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer's equity securities registered under

Section 12 of the Exchange Act must be disclosed quarterly in Forms 10-Q and 10-K.[2] Foreign private issuers are generally required to disclose buybacks annually,[3] and registered closed-end funds are required to disclose buybacks semi-annually.[4] The Proposed Amendments do not change the Existing Rules as to the frequency of disclosures of buybacks in these periodic filings. However, the Proposed Amendments introduce a new Form SR that requires issuers to disclose buybacks of equity securities within one business day after the buyback is executed.[5]

Items to be disclosed on Form SR. The proposed Form SR requires issuers to disclose:

a. The date of the repurchase;

b. The class of securities purchased;

c. The total number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;

d. The average price paid per share (or unit);

e. The aggregate total number of shares (or units) purchased on the open market;

f. The aggregate total number of shares (or units) purchased in reliance on the safe harbor in Exchange Act Rule 10b-18;[6] and

g. The aggregate total number of shares (or units) purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).[7]

The SEC, in its proposing release, states its belief that these new requirements to disclose shares repurchased pursuant to Exchange Act Rules 10b-18 and 10b5-1(c) would "enable investors to better understand how an issuer has structured its repurchase activity," in the interest of providing greater transparency and enabling more timely investor review of buyback transactions.[8]

Proposed Amendments on Mode of Buyback Disclosure

Machine Readable Data Language. The Existing Rules do not require that a machine readable data language be used for buyback disclosures. Issuers may use non-machine readable data languages such as ASCII or HTML. The Proposed Amendments would require buyback disclosures to be made using a structured, machine-readable data language in Inline XBRL.

Practical Considerations

The Proposed Amendments, if implemented, may present additional compliance costs for issuers seeking to implement buyback programs in the future, particularly increased costs associated with furnishing a Form SR one business day following the execution of the buyback order. Issuers should also consider the additional disclosure obligations relating to Exchange Act Rules 10b-18 and 10b5-1(c) that would be imposed by the Proposed Amendments. Moreover, since the Proposed Amendments amend the insider trading provisions under Exchange Act Rule 10b5-1(c), these amendments should be considered in the wider context of recently proposed amendments to Rule 10b5-1.9 See our client alert on SEC's proposed amendments to Rule 10b5-1's affirmative defense to insider trading liability.

The proposed filing requirement of new Form SR one business day after each daily stock purchase could impact share repurchases. As noted by Commissioner Roisman, it is possible that this filing requirement might provide a roadmap of companies' share repurchase strategies, which has the potential to change such strategies.[10]

The Proposed Amendments are in addition to requirements under applicable stock exchange regulations to promptly disclose material news, such as major repurchase announcements.

The Proposed Amendments are subject to a 45-day comment period from the date it is published in the Federal Register, which is a relatively short timeframe that overlaps with major holidays as well as with the comment periods of several other SEC rulemaking proposals. The proposing release raises many questions for comment. Interested parties should assess as soon as possible whether they want to submit a comment letter to highlight issues that are of particular interest to them and if so, begin work on any such comment letter promptly.

See the Proposed Amendments and its related Fact Sheet and SEC announcement.

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ENDNOTES

[1] See Regulation S-K, Item 703, 17 CFR 229.703, available at https://www.ecfr.gov/current/title-17/chapter-II/part-229#229.703.
[2] See Item 2(c) of Form 10-Q, available at https://www.sec.gov/files/form10-q.pdf, and Item 5(c) of Form 10-K, available at https://www.sec.gov/files/form10-k.pdf.
[3] See Item 16E and Instruction to Item 16E of Form 20-F, available at https://www.sec.gov/files/form20-f.pdf.
[4] See Item 9 of Form N-CSR, available at https://www.sec.gov/files/formn-csr.pdf.
[5] The SEC has defined "execution" as the "ending point of a transaction is when the actual exchange of securities and payment occurs, which is known as 'settlement.' The date of execution (i.e., the trade date) marks an earlier point of a securities transaction at which the parties have agreed to its terms and are contractually obligated to settle the transaction." See Section 206(3) of the Investment Advisers Act of 1940, Release No. IA-1732, (July 17, 1998) [63 FR 39505 (July 23, 1998)] at notes 13-14 and accompanying text.
[6] Rule 10b-18, which was adopted in 1982 and amended in 2003, provides a voluntary, non-exclusive "safe harbor" from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5,
when an issuer or its affiliated purchaser bids for or purchases shares of the issuer's common stock in accordance with the Rule 10b-18's manner, timing, price, and volume conditions. See *Purchases of Certain Equity Securities by the Issuer and Others*, Release No. 33-8335 (Nov. 10, 2003) [68 FR 64952 (Nov. 17, 2003)]; *Adoption of Safe Harbor*, Release No. 34-19244 (Nov. 17, 1982), [47 FR 53333 (Nov. 26, 1982)].
[7] See Proposing Release at 12.
[8] See Proposing Release at 15.
[9] See Securities and Exchange Commission Proposed Rule, "Rule 10b5-1 and Insider Trading," Rel. No. 33-11013, (Dec. 15, 2021), https://www.sec.gov/rules/proposed/2021/33-11013.pdf?utm_medium=email&utm_source=govdelivery.
[10] See https://www.sec.gov/news/statement/roisman-buybacks-20211215