

# Legal Update

## SEC Adopts New Share Repurchase Disclosure Rules

### Executive Summary

On May 3, 2023, the U.S. Securities and Exchange Commission (the "SEC") adopted, by a 3-to-2 vote, amendments (the "Amendments")<sup>1</sup> 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." The Amendments require quantitative and qualitative disclosure of buybacks on a day-by-day basis but, in a significant change from the SEC's original proposal that would have required next business day reporting, this disclosure will be required on either a quarterly or semi-annual basis, depending on the type of issuer. The amendments also revise and expand the existing periodic disclosure requirements for buybacks.

The Amendments apply to issuers that repurchase securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), including smaller reporting companies, emerging growth companies, foreign private issuers ("FPIs") and registered closed-end investment management companies that are exchange traded ("Listed Closed-End Funds"). The Amendments require disclosure for all buybacks, without a materiality threshold.

### Background

An issuer may undertake repurchases through a number of methods, including through open market purchases, tender offers, privately negotiated repurchases or accelerated share repurchase programs. Currently, SEC filings are not required to, and typically do not, disclose the specific days on which buybacks pursuant to an announced repurchase plan or program were executed. The Amendments revise and expand the buyback disclosure currently required by Item 703 of Regulation S-K, Item 16E of Form 20-F and Item 14 of Form N-CSR by requiring additional information with respect to buybacks, including quantitative and qualitative details of daily trades. According to the adopting release, the SEC believes that the Amendments "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."

The SEC originally proposed share repurchase disclosure amendments on December 15, 2021. The SEC re-opened the comment period for this rulemaking twice, once in order to allow more time following a technological error in the SEC’s internet comment form that potentially affected comments on a number of SEC proposals, and a second time in connection with an SEC staff report analyzing the potential economic effects of the new excise tax on buybacks contained in the Inflation Reduction Act of 2022.

The following table summarizes key aspects of the Amendments compared to the Existing Rules:

	Existing Rules	Amendments
<b>I. Disclosure Requirements</b>		
Total number of shares repurchased	Disclose amounts purchased each month in an issuer’s regular periodic filings, reported month by month for each month covered by the periodic filing.	Issuers that file on domestic forms must report purchases on a day-by-day basis, quarterly on Form 10-Q and, with respect to the fourth quarter, on Form 10-K.  FPIs that report on Form 20-F and Form 6-K (“FPI Forms”) must report purchases on a day-by-day basis, quarterly on new Form F-SR.  Listed Closed-End Funds must report on a day-by-day basis, semi-annually on Form N-CSR.
Average price paid per share	Required.	Disclose this information on a daily basis for each buyback transaction, quarterly or semi-annually depending on type of issuer.
Total number of shares repurchased as part of publicly announced plan or program	Required.	Required.
Maximum number of shares that may yet be purchased under plans or programs	Required.	Required.
Objectives or rationales for the buyback and process/criteria used to determine repurchase amounts	Not required.	Required.
Policies and procedures relating to transactions by officers and directors during a buyback program	Not required.	Required.
Whether buyback was made pursuant to a plan intended to satisfy the Rule 10b5-1(c) affirmative defense	Not required.	Required.

	Existing Rules	Amendments
Whether buyback was intended by the issuer to qualify for the Rule 10b-18 non-exclusive safe harbor	Not required.	Required.
Disclosure of principal terms of buyback transaction	Required by footnote.	Required narratively in more detail than the Existing Rules.
II. Timing of Disclosure		
Disclosure of buyback information	Disclose in periodic filings, reported month by month for each month covered by the periodic filing.  Frequency depends on type of issuer and form used.	Disclose on a daily basis for each buyback transaction, quarterly or semi-annually depending on type of issuer: <ul style="list-style-type: none"> <li>• On Forms 10-Q or 10-K for issuers using those forms.</li> <li>• On new Form F-SR for FPIs that report on FPI Forms.</li> <li>• On Form N-CSR for Listed Closed-End Funds.</li> </ul>
III. Mode of Disclosure		
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).

## Amendments to Buyback Disclosure Requirements

The table above summarizes the information that issuers are required to disclose under the Existing Rules and the additional disclosure required by the Amendments.

Below, we discuss certain of the expanded disclosure requirements in more detail.

**Quarterly or Semi-annual Disclosure.** The proposed rules would have required next business day disclosure for buybacks. In a significant change, the Amendments, as adopted, require quantitative and qualitative information regarding buybacks on a day-by-day basis, but such disclosure is required quarterly or semi-annually, depending on the type of issuer.

The Existing Rules require issuers to disclose buybacks in their periodic reports. For Section 12 issuers reporting on Forms 10-Q and 10-K, 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, on a month-by-month basis. FPIs are generally required to disclose buybacks annually, and Listed Closed-End Funds are required to disclose buybacks semi-annually. In the adopting release, the SEC states that the current reporting regime "in which investors receive information only about the monthly

aggregate repurchases of issuers, fails to provide enough detail for investors to draw informed conclusions about the purposes and effects of many repurchases.”

The Amendments replace the current month-by-month disclosure on Forms 10-K and 10-Q with a day-by-day requirement, set forth in new Exhibit 26 for such periodic reports. FPIs that file on FPI Forms will be required to provide day-by-day disclosure for buybacks, quarterly on new Form F-SR, which will be due 45 days after the end of each issuer’s fiscal quarters. Listed Closed-End Funds will be required to provide day-by-day disclosure for buybacks, semi-annually on Form N-CSR. The adopting release states that the “purpose of these amendments is to improve the information investors receive to better assess the efficiency of, and motives behind, an issuer repurchase.” It is unclear whether investors really sought out, or will benefit from, daily quantitative repurchase data. In this respect, the adopting release argues that “daily repurchase data, in combination with other data, would allow investors to infer when repurchases may have been timed to benefit managers or otherwise at the expense of some investors.”

**Location of Disclosure.** While the SEC originally proposed that issuers would provide daily buyback disclosure on new Form SR, the Amendments require disclosure of daily buyback information on either a quarterly or semi-annual basis, depending on the type of issuer:

- Issuers filing on domestic SEC forms must provide buyback disclosure quarterly on new Exhibit 26 to Forms 10-K and 10-Q.
- FPIs reporting on FPI Forms must provide buyback disclosure quarterly on new Form F-SR. According to the adopting release, “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.”
- Listed Closed-End Funds must provide buyback disclosure annually and semi-annually on Form N-SCR.

**Affirmative Defense to Insider Trading – Exchange Act Rule 10b5-1(c).** Exchange Act Rule 10b5-1(c) provides an affirmative defense to insider trading claims relating to an issuer’s purchase of securities. 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 specific requirement for an issuer to disclose whether a particular repurchase was undertaken pursuant to a plan intended to benefit from Rule 10b5-1(c)’s affirmative defense. The Amendments introduce a new requirement that an issuer must now disclose in tabular form the aggregate total number of shares purchased in reliance on the plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). In addition, the Amendments require issuers to disclose, by footnote to the daily repurchase table, the date of adoption or termination of any plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for the buybacks.

The Amendments also adopt new Item 408(d) of Regulation S-K, creating new narrative disclosure requirements with respect to issuer Rule 10b5-1 trading arrangements. For example, Item 408(d) requires quarterly disclosure in periodic reports on Forms 10-Q and 10-K (for the fourth quarter) of the issuer’s adoption or termination of Rule 10b5-1 trading arrangement. In addition, Item 408(d) requires a description of the material terms of the Rule 10b5-1 trading arrangement, including the date on which the issuer adopted or terminated the Rule 10b5-1 trading arrangement, the duration of the Rule 10b5-1 trading arrangement and the aggregate number of securities to be purchased or sold pursuant to the Rule 10b5-1 trading arrangement. However, this new item does not require disclosure with respect to the price at which the party executing the Rule 10b5-1 trading arrangement is authorized to trade.

**Safe Harbor for Common Stock Repurchases – Exchange Act Rule 10b-18.** Exchange Act Rule 10b-18 provides conditions that, if met, provide a non-exclusive safe harbor for repurchases of common stock from market manipulation claims under Section 9(a)(2) and Rule 10b-5 of the Exchange Act. Under the Existing Rules, there is no additional, specific disclosure required for repurchases made pursuant to Rule 10b-18. The Amendments introduce a new requirement that an issuer must disclose in tabular form the aggregate total number of shares repurchased that were intended to qualify for the safe harbor of Rule 10b-18.

**Checkbox.** The Amendments require a checkbox above the tabular daily buyback disclosures indicating whether directors or Section 16 reporting officers (or, in the case of FPIs, senior management) purchased or sold shares that are the subject of the issuer’s share repurchase program four business days before or after the announcement of such program or the announcement of an increase of an existing share repurchase plan or program.

In assessing whether the checkbox disclosure is needed, the Amendments allow an issuer to rely on the following, unless the issuer knows or has reason to believe that a form was filed inappropriately or that a form should have been filed but was not:

- A review of Forms 3 and 4 (17 CFR 249.103 and 249.104) and amendments thereto filed electronically with the SEC during the issuer’s most recent fiscal year;
- A review of Form 5 (17 CFR 249.105) and amendments thereto filed electronically with the SEC with respect to the issuer’s most recent fiscal year;
- Any written representation from the reporting person that no Form 5 is required, which representation must be maintained in the issuer’s records for two years, with a copy made available to the SEC or its staff upon request; and
- For FPIs, any written representations from the directors and senior management who would be identified pursuant to Item 1 of Form 20-F, provided that the reliance is reasonable, and the issuer maintains the representation in its records for two years, with a copy made available to the SEC or its staff upon request.

**Objectives or rationales for the buyback and policies and procedures for issuer’s directors and officers.**

Under the Amendments, an issuer will be required to narratively disclose in its periodic reports the objectives or rationales for its buybacks and the process or criteria used to determine the repurchase amounts. It also must disclose 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 transactions.** The Existing Rules 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 Amendments continue to require this information, but in more detail and, in some cases, in the main text of the narrative discussion instead of a footnote. The disclosure required by the Amendments includes the number of shares purchased other than through a publicly announced program and the nature of the transaction (e.g., whether the purchases were made in open market transactions, tender offers, in satisfaction of the issuer’s obligations upon exercise of outstanding put options issued by the issuer, or other transactions), and certain other disclosures for publicly announced repurchase programs, as well as the information described in the preceding paragraph.

**Required Tabular Disclosures.** Issuers will be required to disclose for each day shares were repurchased:

- 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 total number of shares (or units) purchased as part of a publicly announced repurchase program;
- f. The aggregate maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the publicly announced repurchase programs;
- g. The total number of shares (or units) purchased on the open market, which includes all shares (or units) repurchased by the issuer in open market transactions (excluding tender offers and put options);
- h. The total number of shares (or units) purchased that are intended by the issuer to qualify for the Rule 10b-18 safe harbor; and
- i. The total number of shares (or units) purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

As noted above, issuers must disclose by footnote to the table the date of adoption or termination of any plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for the buybacks.

**Filed Information.** In the SEC's original proposal involving next business day reporting of buybacks on Form SR, the SEC proposed that such daily buyback disclosure would be "furnished" rather than "filed." However, when revising the disclosure requirement to a quarterly or semi-annual basis, the SEC determined that the buyback disclosure will be considered "filed," meaning that issuers will be subject to liability for misleading statements under Section 18 of the Exchange Act for this new disclosure, and such information will be incorporated by reference into other filings under the Securities Act of 1933, which are subject to Securities Act Section 11 liability.

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

## Compliance Dates

The Amendments become effective 60 days after publication in the *Federal Register*. However, even though the Amendments will be effective at that time, the SEC provided the following transition periods, allowing additional time before the new disclosures will be required.

Except as provided below, issuers will be required to comply with the Amendments on Forms 10-Q and 10-K (for their fourth fiscal quarter), beginning with the first filing that covers the first full fiscal quarter that begins on

or after October 1, 2023. For calendar year-end companies, this means the first disclosures will be in the Form 10-K for the year ending December 31, 2023, with such disclosure covering repurchase activities that occurred in the fourth quarter of 2023.

FPIs that file on FPI Forms will be required to comply with the Amendments in new Form F-SR, beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024. The Form 20-F narrative disclosure that relates to the Form F-SR filings will be required starting in the first Form 20-F filed after the FPI's first Form F-SR has been filed. For calendar year-end companies, this means the first Form F-SR will be required with respect to the second quarter of 2024, which will be due on or before August 14, 2024, and the narrative disclosure will be required in the Form 20-F for the year ending December 31, 2024.

Listed Closed-End Funds will be required to comply with the Amendments, beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024. For calendar year-end companies, this means the first disclosures will be in the Form N-CSR for the semi-annual period ending June 30, 2024.

## Practical Considerations

Companies may be more reluctant to rely on Rule 10b5-1(c) and Rule 10b-18, or may want to give closer consideration to their decisions with respect to reliance on the affirmative defense and/or the safe harbor. The adopting release notes concerns expressed by commenters regarding disclosures relating to reliance by issuers on the affirmative defense and the safe harbor leading to speculation or cause for negative inference; however, in the adopting release, the SEC states, "we believe that any unwarranted inferences from disclosure that an issuer did or did not use such safe harbor or defense would be limited." Certainly, going forward, there will be closer scrutiny, whether or not warranted (including from plaintiffs' law firms) of specific buyback decisions, as well as of the use of trading plans.

Companies should begin preparing disclosure controls to implement the new buyback disclosure requirements. For example, companies need to have a process in place to gather and maintain buyback information to be presented in the required tabular daily buyback disclosure. It would be useful for companies to prepare this buyback disclosure information throughout the particular quarter to allow time for the report to be accurately gathered from brokers and then compiled and checked. Similarly, companies will need a process to assess the narrative buyback disclosure, keeping in mind that objectives and rationales may change from filing to filing based on circumstances impacting the period. Companies will want to consider carefully the degree of detail that they choose to include in their filings regarding their buyback strategies and the alternatives to buybacks that may have been employed, as discussed below. In addition, there should be disclosure controls in place with respect to the checkbox for director and officer trades within four business days before or after the announcement of a share repurchase program or an increase to a share repurchase agreement, which should include reviewing Section 16 reports and/or obtaining representations and assessing whether such reliance is reasonable. For FPIs, implementing a process with respect to obtaining director, officer and senior management certifications may be more challenging. The policies also will require addressing the recordkeeping requirements.

The Amendments do not require that company insider trading policies contain any specific restrictions, but they do require narrative disclosure of any policies and procedures relating to purchases and sales of the company's securities by its officers and directors during a company buyback program, including any restrictions on such transactions. Because of this disclosure requirement, some companies may consider the circumstances under

which to permit officers and directors to trade in company shares while a company buyback program is ongoing. However, this interplay may be difficult to monitor with director and officer Rule 10b5-1 plans. To the extent that companies follow any informal procedures for such trading, they may want to assess documenting these.

Companies should begin planning for their new disclosures regarding objectives, rationales and processes for share repurchases and consider what impact these disclosures may have on investors, research analysts and others. It would be useful for companies to draft sample language well in advance of the compliance date for such disclosure to allow for input from their investor and/or public relations departments, finance department, law department, outside counsel, senior management and directors.

The new disclosure requirements regarding objectives, rationales and processes must be tailored to the specific issuer. Among the possible ways to avoid boilerplate disclosure, the adopting release highlighted the following suggestions from commentators as being helpful:

- Discussing other possible ways for the issuer to use the funds allocated for the repurchase;
- Comparing the repurchase with other investment opportunities that the company would ordinarily consider, such as capital expenditures and other uses of capital;
- Discussing the expected impact of the repurchases on the value of remaining shares;
- Discussing the factors driving the repurchase, including an issuer's belief as to whether its stock is undervalued, prospective internal growth opportunities are economically viable or the valuation for potential targets is attractive; and
- Discussing 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.

Companies and their boards of directors may want to consider how they document their decisions regarding buybacks and whether they seek more formal advice of their financial intermediaries that act as repurchase agents, whether in the form of a presentation or otherwise, addressing the expected impact of the repurchases, other uses of cash and similar matters.

While the buyback rationale disclosure must be tailored for each company's particular circumstances, a sample rationale and disclosure is set forth below:

The company's board of directors, in accordance with its fiduciary duties under state corporation law, considers share buybacks to be one of several valuable ways our company can deploy capital. The first way is to reinvest in existing businesses, from employee training and customer support to repaying lenders. An alternative is to acquire new businesses. After considering these deployments, next is either to repurchase shares if they can be acquired cheaply or, if not, pay a dividend. We may undertake share buybacks when we lack better ways to deploy capital and our shares are priced below value. Since 2023, we also take into account the excise taxes imposed on share buybacks and other administrative costs. In addition, to assure that selling shareholders are not disadvantaged by selling at a discount, we comply with all of our disclosure obligations designed to enable shareholders to make a reasonable estimate of share value in deciding whether to sell. We believe that our share buyback



policy is in the best interests of our corporation and its shareholders and is also consistent with the interests of our other stakeholders.

With respect to shares withheld to satisfy tax withholding upon exercise or vesting of equity awards, the adopting release acknowledges that at least one commenter sought clarification regarding whether the requirement to disclose share repurchases extends to shares withheld to cover tax withholding obligations. The SEC declined to provide such clarification, noting only that “terms, times, and transactions used for, and applicable to, the current Item 703 disclosure requirements should be applied to the final amendments.” In this regard, it is worthwhile to reexamine existing compliance and disclosure interpretations (e.g., 149.01) and consider whether the company’s routine withholding of shares upon the exercise or vesting of equity awards must be included in the new quarterly disclosure tables.

The Amendments prescribe many specific disclosure requirements. However, when preparing these disclosures companies should also consider whether any additional information in connection with their buyback disclosures is material. As noted by the SEC in the adopting release, “[t]o the extent further material information is necessary to make such disclosures not misleading, the issuer will be required to provide that information under existing Rule 12b-20.”

For Canadian issuers that file SEC reports using the Multijurisdictional Disclosure System (“MJDS”), the SEC clarified in footnote 219 to the adopting release for the Amendments that it is “not imposing the amended repurchase disclosure requirements on Canadian issuers that file using the MJDS because those issuers are subject to a separate reporting regime.” As explained in this footnote, “Under the MJDS, eligible Canadian issuers may satisfy certain securities registration and reporting requirements of the Commission by providing disclosure documents prepared in accordance with the requirements of Canadian securities regulatory authorities.”

Financial intermediaries that act as stock repurchase agents may want to review their form issuer repurchase agreements for necessary amendments. While the proposed rules would have raised a number of issues for accelerated share repurchase programs (“ASRs”), the Amendments will pose fewer practical challenges for ASRs. Nonetheless, derivatives dealers may want to review their form ASR documentation, and companies that rely on ASRs for their buybacks may, in light of the new narrative disclosure requirements, find it necessary to discuss the rationale for having chosen an ASR versus another execution format. Financial intermediaries that recently updated their issuer Rule 10b5-1 trading plan documentation also will want to review these again in light of these Amendments.

Because the Amendments require disclosures related to Rule 10b5-1 trading arrangements, they should be considered in the wider context of the amendments to Rule 10b5-1. For more information, see Mayer Brown’s Legal Update, “SEC Adopts Amendments to Rule 10b5-1’s Affirmative Defense to Insider Trading Liability & Related Disclosures, dated December 19, 2022.”<sup>2</sup>

Finally, for companies, the Amendments are in addition to requirements under applicable stock exchange regulations to promptly disclose material news, such as major repurchase announcements.

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## ENDNOTES

<sup>1</sup> The adopting release containing the Amendments is available at <https://www.sec.gov/rules/final/2023/34-97424.pdf>.

<sup>2</sup> Available at <https://www.mayerbrown.com/en/perspectives-events/publications/2022/12/sec-adopts-amendments-to-rule-10b5-1s-affirmative-defense-to-insider-trading-liability-and-related-disclosures>

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