



ALERTS

SEC Adopts Final Share Repurchase Rules

May 17, 2023

Highlights

The SEC has adopted final rules that are intended to enhance public company disclosure regarding share repurchase programs

Under the rules, companies will be required to disclose, among other things, daily repurchase activity, narrative disclosure in periodic reports regarding repurchase programs and practices, and adoption and termination of issuer 10b5-1 trading arrangements

U.S. public companies are required to comply with the new rules beginning with the first filing that covers the first full fiscal quarter beginning on or after Oct. 1, 2023 (i.e., the 2024 Form 10-K for calendar year-end issuers)

On May 3, 2023, the Securities and Exchange Commission (SEC) adopted [final rules](#) that require public companies to provide enhanced disclosure regarding their share repurchase programs and buyback activity.

According to the [SEC's announcement](#), the rules “will improve disclosure and provide investors with enhanced information to assess the purposes and effects of share repurchases.” SEC Chairman [Gary Gensler](#) also

RELATED PEOPLE



Taylor K. Wirth

Partner
Nashville

P 615-621-6010
F 615-621-6099
Taylor.Wirth@btlaw.com



David P. Hooper

Partner
Indianapolis

P 317-231-7333
F 317-231-7433
david.hooper@btlaw.com



Jay H. Knight

Partner
Nashville

P 615-621-6009
F 615-621-6099
Jay.Knight@btlaw.com

RELATED PRACTICE AREAS

Corporate
Financial and Regulatory Litigation
Securities and Capital Markets

RELATED INDUSTRIES

Financial Services

highlighted that the amendments are intended to improve the transparency and integrity of the buyback and reduce information asymmetries between issuers and investors in buybacks, thereby improving market information.

In a statement, SEC Commissioner [Hester M. Peirce](#) expressed [skepticism](#) about the scope of the new rules, questioning whether the new disclosure requirements are too granular, creating “white noise” for investors and the market, and raised concerns regarding the costs associated with tracking and preparing disclosure.

The rules impose the following requirements:

1. Disclose daily repurchase activity quarterly
2. Check a box indicating if certain directors and officers traded in the relevant securities within four business days before or after the public announcement of an issuer’s repurchase plan or program
3. Provide narrative disclosure regarding the issuer’s repurchase programs and practices in its periodic reports
4. Provide quarterly disclosure in an issuer’s periodic reports on Form 10-K and Form 10-Q related to an issuer’s adoption and termination of 10b5-1 trading arrangements

There are no exemptions or special phase-in schedules for smaller reporting companies or emerging growth companies.

The new rules require U.S. public companies to comply beginning with the first filing that covers the first full fiscal quarter beginning on or after Oct. 1, 2023 (i.e., the 2024 Form 10-K for calendar year-end issuers). Foreign private issuers and certain registered closed-end funds are also required to comply with the new rules beginning on or after April 1, 2024 and Jan. 1, 2024, respectively.

Disclosure of Daily Repurchase Activity

In a new exhibit, issuers are required to disclose in tabular format aggregated daily repurchase activity, including:

- Identification of the class of securities purchased
- Total number of shares repurchased, including all issuer repurchases whether or not made pursuant to a publicly announced plan or program
- Average price paid per share
- Aggregate total number of shares purchased on the open market
- Aggregate total number of shares purchased that are intended to qualify for safe harbor provided by Rule 10b-18
- Aggregate total number of shares purchased that are intended to qualify for the affirmative defense conditions of Rule 10b5-1(c)

The exhibit must be filed (rather than furnished, as originally proposed)

with an issuer's Form 10-Q and Form 10-K (for the fourth fiscal quarter). This is a significant change from the proposed rules, which would have required the filing of the exhibit before the end of the first business day following the day on which the issuer executed a share repurchase.

The data contained in the exhibit must be tagged in iXBRL format and replaces the existing share repurchase disclosure per Regulation S-K, Item 703 in an issuer's periodic reports.

Trading Activity of Directors and Officers

The rules also require an issuer to include a checkbox above its tabular disclosures on the exhibit indicating whether Section 16 officers or directors purchased or sold shares within four business days before or after the announcement of a repurchase plan or program. This four business day period is a reduction from the 10 business day period that was originally proposed.

Narrative Revisions to Repurchase Disclosure

The new rules also require expanded disclosure regarding (i) an issuer's objectives or rationales for its share repurchases and the process or criteria used to determine the amount of repurchases and (ii) 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 restrictions on such transactions. In addition, the currently required disclosure in Regulation S-K, Item 703 regarding the number of shares purchased under publicly announced repurchase plans, which appeared as a footnote to the table reflecting monthly repurchases, will now be required in the main text of the narrative discussion.

The SEC noted it expects issuers to provide the required narrative disclosure regarding their rationale for share repurchases without relying on boilerplate language, and therefore such disclosure should be appropriately tailored to an issuer's unique facts and circumstances. Acknowledging recommendations from commenters, the adopting release offered several suggestions for the required narrative disclosure, including discussing (i) possible ways to use the funds allocated for repurchase and comparing with other investment opportunities ordinarily considered by issuers (e.g., capital expenditures); (ii) the expected impact of repurchases on the value of remaining shares; (iii) other factors driving repurchases (e.g., whether stock is undervalued, or viability of possible growth opportunities); and (iv) sources of funding for the repurchase, where material.

Quarterly Disclosure of Issuer 10b5-1 Trading Arrangements

In order to complement the disclosures concerning the adoption or termination of 10b5-1 plans and arrangements by directors and officers, the SEC also adopted new Item 408(d) of Regulation S-K to require companies to provide similar disclosure for issuer repurchase 10b5-1 plans and arrangements.

The rule requires quarterly disclosure in periodic reports on Forms 10-Q and Form 10-K (for the fourth fiscal quarter) if an issuer adopted or

terminated any contract, instruction, or written plan to purchase or sell its securities, whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and a description of the material terms of the contract, instruction or written plan.

In a change from the proposal, issuers will not be required to disclose information about the adoption or termination of any trading arrangement for the purchase or sale of securities of the issuer that meets the requirements of a non-Rule 10b5-1 trading arrangement.

Practical Takeaways

Due to the heightened focus on issuer repurchases, companies should expect additional scrutiny from the SEC, investors and plaintiffs. Public companies should prepare now in anticipation of publicly disclosing the additional information required by the new rules.

For example, issuers should consider these best practices:

- Analyze existing policies to ensure compliance with the new rules, and adopt new policies and procedures, if required
- Confirm that there are adequate controls and procedures in place to ensure that the collection and disclosure of the required information is timely and accurate
- Confirm rationale and objectives for buyback programs for the newly required narrative disclosures

On May 12, 2023, the U.S. Chamber of Commerce filed suit against the SEC in the Fifth Circuit asking the court to review the SEC's order approving the final rule, with the goal of preventing the implementation of the rules. The SEC has responded that it will vigorously defend the rule in court. Notwithstanding the action, issuers should take steps to prepare for the planned effective date of the rules.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Taylor Wirth at taylor.wirth@btlaw.com, David Hooper at 317-231-7333 or david.hooper@btlaw.com, or Jay Knight at jay.knight@btlaw.com.