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SEC Adopts Amendments to Share Repurchase Disclosure Requirements

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The Securities and Exchange Commission (“SEC”) recently adopted amendments to modernize the disclosure requirements related to repurchases of an issuer’s equity securities by an issuer, an “affiliated purchaser” (as defined in Rule 10b-18(a)(3)) or any person acting on behalf of an issuer or affiliated purchaser (collectively, an “Issuer”). These amendments (the “Rules”) will significantly expand the disclosure required by public companies in connection with Issuer stock repurchases. However, notably, the SEC “dialed back” several disclosure requirements that were included in the proposed rules based on the views expressed in comment letters. For example, while the Rules require disclosure of *daily* share repurchase activity by Issuers in a tabular format, this disclosure will be required for public companies on a quarterly basis instead of the next business day. The SEC noted that it adopted the Rules to provide investors with enhanced information to assess the purposes and effects of Issuer repurchases. In addition to the tabular disclosures required by the Rules, companies will also be required to provide additional narrative disclosures on Issuer repurchases, as well as disclosures on Issuer-adopted Rule 10b5-1 trading plans (“10b5-1 Plans”) and checkbox disclosure on certain purchases and sales of securities by company insiders immediately before or after the announcement of a repurchase plan (as described below).

Companies that file on Forms 10-Q and 10-K (“Domestic Filers”) will be required to comply with the Rules beginning with their first filing covering a full fiscal quarter beginning on or after October 1, 2023, with foreign private issuers (“FPIs”) required to comply with respect to the first full fiscal quarter beginning on or after April 1, 2024.

Following adoption of the Rules, on May 12, 2023, the U.S. Chamber of Commerce (the “Chamber”), joined by the Texas Association of Business and the Longview Chamber of Commerce, sued the SEC in the U.S. Court of Appeals for the Fifth Circuit under both the Administrative Procedure Act and the U.S. Constitution in order to stop it from implementing the Rules. The Chamber claims that the mandatory disclosure required by the Rules constitutes “compelled speech” in violation of the First Amendment of the U.S. Constitution.

Tabular Disclosure of Repurchases

Domestic Filers will be required to include tabular disclosure of their daily repurchase activity for each quarter on a new Exhibit 26 to Form 10-Q and Form 10-K (for the fourth fiscal quarter), a notable increase in disclosure obligations from the aggregated monthly repurchase activity disclosures currently required by Item 703 of Regulation S-K. For each day on which shares are repurchased, the company must provide the following information in Inline XBRL-tagged format:

- The date the repurchase is executed;
- The class of shares repurchased;
- The number of shares repurchased by the Issuer, regardless of whether made pursuant to a publicly announced plan or program of repurchase (a “Repurchase Plan”);
- The total number of shares repurchased by the Issuer pursuant to a Repurchase Plan;

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- The average price paid per share, reported in U.S. dollars and excluding brokerage commissions and other costs of execution;
- The aggregate maximum number of shares (or approximate dollar amount) that may still be purchased under a Repurchase Plan;
- The total number of shares repurchased in the open market, including all shares repurchased in open-market transactions but excluding shares purchased (i) in tender offers, (ii) in satisfaction of the company’s obligations upon exercise of outstanding put rights issued by the company or (iii) in other transactions;
- The number of shares purchased in transactions intended to qualify for the safe harbor set forth in Rule 10b-18 promulgated under the Securities Exchange Act of 1934, as amended; and
- The total number of shares repurchased under a 10b5-1 Plan (including a footnote disclosing the date of adoption or termination of such 10b5-1 Plan).

The SEC provided the following format for the tabular disclosure:

(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)
Total								

FPIs will be required to comply with substantially similar requirements, with such information to be reported quarterly on a new Form F-SR, due within 45 days of the end of each fiscal quarter.

The new information will be considered “filed” instead of “furnished.” As a result, it will be subject to Section 18 liability under the Securities Exchange Act of 1934, as amended, and will also be subject to Section 11 liability under the Securities Act of 1933, as amended, to the extent it is incorporated by reference into filings under the Securities Act.

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Checkbox Disclosure

Companies must include a checkbox preceding the tabular disclosure described above to indicate whether certain insiders purchased or sold shares of a class subject to a Repurchase Plan within four business days before or after the announcement of a Repurchase Plan (or the announcement of an increase in the number of shares to be purchased under an existing Repurchase Plan). Companies are allowed to include a footnote in which they can provide additional context to such sales, and such disclosure is required if material and necessary to prevent the required disclosures from being misleading. For Domestic Filers, this requirement applies to sales by any Section 16 officer or director, and for FPIs it applies to any director or member of senior management who would be identified under Item 1 of Form 20-F.

Narrative Disclosure

In addition to the required tabular disclosures and insider checkboxes, the Rules also expand upon the narrative disclosure requirements currently required under Item 703 of Regulation S-K and Item 16E of Form 20-F. Companies will be required to disclose the following information about repurchase plans or programs:

- The objectives or rationales for each repurchase plan or program;
- The process or criteria used to determine the amount of repurchases;
- Any policies or procedures relating to purchases or sales by the company's officers or directors during a repurchase plan or program, including any restrictions imposed on such purchases or sales; and
- The number of shares repurchased by an Issuer other than through a Repurchase Plan and the nature of any such repurchases (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company's obligations upon exercise of outstanding put options issued by the company or other transactions).

Companies must continue to provide the following information (which has been required as footnote disclosure under existing rules) about any Repurchase Plans in narrative form:

- The date each such Repurchase Plan is announced;
- The dollar amount or number of shares approved for repurchases under such Repurchase Plan;
- The expiration date of such Repurchase Plan, if any;
- Any Repurchase Plan that has expired in the covered period; and
- Any Repurchase Plan that the company has determined to terminate prior to its expiration, or under which the company does not intend to make further purchases.

The narrative disclosure described above must be provided quarterly on Forms 10-Q and 10-K for Domestic Issuers and annually on Form 20-F for FPIs.

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10b5-1 Plans

The Rules impose requirements upon Domestic Filers that have adopted 10b5-1 Plans similar to those adopted in December 2022 for officers and directors who have adopted 10b5-1 Plans. Under the new Item 408(d) of Regulation S-K, Domestic Filers will be required to disclose on Forms 10-Q and 10-K the material terms (other than pricing terms) of any company-adopted 10b5-1 Plans, including the following:

- The date of any such 10b5-1 Plan's adoption or termination;
- The duration of such 10b5-1 Plan; and
- The aggregate number of shares to be repurchased or sold under such 10b5-1 Plan.

Of particular note, companies will not be subject to any cooling-off periods prior to the use of 10b5-1 Plans, any limitations on the use of multiple overlapping plans or any limitations on the use of single-trade plans, and will not be required to disclose whether they have entered into any arrangements that constitute "non-Rule 10b5-1 trading arrangements."

Compliance

Domestic Filers must comply with the Rules beginning with the periodic report that covers the first full fiscal quarter that begins on or after October 1, 2023. For calendar year Domestic Filers, this will mean that the Rules will first be in effect for the 2023 Form 10-K. FPIs will be required to comply with the tabular disclosure and checkbox requirements in the 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. FPIs must comply with the narrative disclosure requirements beginning with the first Form 20-F an FPI files after filing its first Form F-SR.

There are no accommodations under the Rules for smaller reporting companies or emerging growth companies.

Conclusion

In advance of the compliance dates of the Rules, companies should begin evaluating their existing internal processes and controls relating to share repurchases, including data collection and procedures for the approval and implementation of repurchase plans or programs. Companies should also determine who their affiliated purchasers are and establish mechanisms to track purchases by such affiliated purchasers. Prior to the implementation of a repurchase plan or program, companies should carefully consider and document the "objectives and rationales" underlying such repurchase plan or program and any other factors that will need to be discussed in the narrative disclosures. Companies should also assess whether to adopt new policies or revise existing policies with respect to share purchases or sales by directors or officers under a repurchase plan or program. In addition to preparing for compliance with the Rules, companies should also take into account the optics surrounding any potential repurchase, as the additional disclosure required by the Rules will likely result in increased scrutiny from investors.

The adopting release for the Rules can be found [here](#). For further information, please contact a member of the Haynes and Boone [Capital Markets and Securities Practice Group](#).