GIBSON DUNN

SEC Adopts Amendments to Enhance Company Stock Repurchase Disclosure Requirements

Client Alert | May 5, 2023

On May 3, 2023, the Securities and Exchange Commission ("SEC" or "Commission"), in a 3-to-2 vote, adopted amendments to the disclosure requirements relating to companies' repurchases of their equity securities. The amendments will require companies to: (i) disclose daily repurchase data in a new table filed as an exhibit to Form 10-Q and Form 10-K, (ii) indicate by a check box whether any executives or directors traded in the company's equity securities within four business days before or after the public announcement of the repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program, (iii) provide narrative disclosure about the repurchase program, including its objectives and rationale, in the filing, and (iv) provide quarterly disclosure regarding the company's adoption or termination of any Rule 10b5-1 trading arrangements. The new amendments will invite enhanced scrutiny of companies' share repurchase practices and rationales.

While reflecting a prescriptive and perhaps quixotic approach to a perceived potential for abuse that the SEC acknowledges is not present in many, or perhaps even most, share repurchases, the final rules reflect a significant paring back from the SEC's initial proposal, which would have required daily reporting of repurchases on a next-day basis. The SEC also confirmed that companies that rely on recently amended Rule 10b5-1 will not be subject to a cooling-off period, any limitation on the use of multiple overlapping plans, any limitation on the use of single-trade plans or any disclosure regarding so-called "non-10b5-1 trading arrangements." These changes reflect the SEC's responsiveness to constructive and pragmatic comments received on its rule proposals, offering a sign of hope for other pending SEC rulemaking initiatives.

The 200+ page adopting release is available here and a Fact Sheet is available here. The final rules will become effective 60 days after publication in the Federal Register. For companies that file on domestic forms, the disclosure requirements will apply to Forms 10-K or 10-Q filed for the first full fiscal quarter beginning on or after October 1, 2023. For calendar year companies, this means that the new disclosures will first appear in their 2023 Form 10-K, showing any repurchases made (and disclosing any related Rule 10b5-1 trading arrangements entered into or terminated) during the fourth quarter. Later effective dates apply for foreign private issuers ("FPIs") and listed closed-end funds, but there are no delays for other categories such as for smaller reporting companies.

Set forth below is a summary of the amendments and some considerations for companies in connection with these SEC rule amendments.

Summary of Amendments

New Periodic Reporting Requirements for U.S. Companies. The amendments introduce the following new periodic reporting requirements:

1. *Daily Quantitative Transaction Disclosure, Reported Quarterly*. Prior to the

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adoption of these amendments, Item 703(a) of Regulation S-K has required companies to include in their Forms 10-Q and 10-K a table reporting specified information on company repurchases of equity securities during each month of the previous quarter, on an aggregated monthly basis. The new amendments require tabular disclosure of the company's daily repurchase activity during the prior quarter. The tabular disclosure will be filed as an exhibit to a company's Form 10-Q or Form 10-K, with FPIs required to report the information quarterly on a new Form F-SR, and listed closed-end funds reporting the information in their semiannual and annual reports on Form N-CSR. There are no exceptions to the reporting requirements, including for smaller reporting companies or for classes of equity securities that are not exchange-traded.A copy of the required format for this table, which will appear as Exhibit 26, is included as an Exhibit to this client alert. The exhibit must be provided in XBRL-tagged format, and must report, for each day on which shares were repurchased:

- the date that the purchase of shares is executed,
- the class of shares repurchased,
- the average price paid per share,
- the total number of shares purchased, including the total number of shares purchased as part of a publicly announced plan,
- the aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under a company's publicly announced plan,
- the number of shares that were purchased on the open market,
- the number of shares purchased in transactions intended to qualify for the safe harbor in Rule 10b-18, and
- the total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), together with a footnote disclosing the date of adoption or termination of the Rule 10b5-1(c) plan.

2. *Check the Box Disclosure.* Companies will be required to include a checkbox preceding the tabular disclosure, indicating whether any Section 16 officer or director purchased or sold shares that are the subject of a publicly announced plan or program within four business days before or after the company's announcement of the stock repurchase plan or program, or the announcement of an increase in the number or amount of securities to be purchased under an existing plan or program. In response to comments, the SEC confirmed that a company may include additional disclosure to provide context to investors regarding any purchases or sales that trigger the checkbox requirement, and the SEC even noted that such disclosure would be required if material and necessary to prevent the required disclosures from being misleading.
3. *Narrative Disclosure.* In addition to requiring tabular disclosures, the new amendments expand upon the existing requirement for narrative disclosures of repurchases in periodic reports. In the section of their Forms 10-Q and 10-K where companies currently report aggregated monthly data on their share repurchases, companies will be required to disclose the following information, and to refer to the particular repurchases in the exhibit table that correspond to the different parts of this narrative:
    - the objectives or rationales for each share repurchase plan or program,
    - the process or criteria used to determine the amount of repurchases,
    - the number of shares purchased *other* than through a publicly announced plan or program, and the nature of the repurchase transactions, such as whether the purchases were made pursuant to equity compensation arrangements, tender offers, etc., and

- any policies and procedures relating to the purchases and sales of the company's securities during a repurchase program by its officers and directors, including whether there are any restrictions on such transactions.

As is currently the case, if a company's repurchase plan or program was publicly announced, the disclosure also must state:

- the date each plan or program was announced,
- the dollar or share amount approved,
- the expiration date, if any, of the plan or program,
- each plan or program that has expired in the relevant period, and
- each plan or program that the company has determined to terminate prior to expiration, or under which the company does not intend to make further purchases.

4. *Disclosure Requirements for 10b5-1 Plans*. In rules adopted last December, the SEC required companies to disclose in their periodic reports whether any executives or directors had entered into or terminated Rule 10b5-1 trading plans (including a modification that is treated as a termination and new plan), and to provide a description of the material terms of any such plans. The issuer repurchase rules adopted by the SEC require substantially similar disclosure regarding any Rule 10b5-1 plan adopted or terminated by the company. As with Rule 10b5-1 trading plans adopted by an executive or director, the company will be required to disclose the date on which it adopted or terminated a Rule 10b5-1 trading plan, the duration of the plan, and the aggregate number of shares to be purchased or sold pursuant to the arrangement. However, in contrast to the disclosure rules applicable to trading plans adopted by executives and directors, companies are not required to disclose whether they entered into an arrangement that meets the SEC's definition of a "non-Rule 10b5-1 trading arrangement." As noted above, the SEC also stated that it is not imposing additional conditions on the availability of the Rule 10b5-1 affirmative defense on companies, such as a cooling-off period, limitations on the use of multiple overlapping plans, or limitations on the use of single-trade plans.

New Periodic Reporting Requirements for Foreign Private Issuers and Listed Closed-End Funds. The amendments impose substantially similar requirements on FPI and listed closed-end funds as they do on domestic companies. The requirements that differ for FPIs and listed closed-end funds are described below:

1. *Foreign Private Issuers.* FPIs will be required to provide the disclosures described above under the new amendments quarterly in their Forms F-SR beginning with the first full fiscal quarter that begins on or after April 1, 2024. Prior to the adoption of these amendments, FPIs were required to annually disclose any company repurchases, aggregated on a monthly basis. Under the new amendments, any FPI that has a class of equity securities registered pursuant to Section 12 of the Exchange Act and does not file Forms 10-Q and 10-K will be required to file a Form F-SR within 45 days after the end of each quarter disclosing the aggregate stock repurchases made each day during the prior quarter. The narrative disclosures required of U.S. domestic company will be required in FPIs' future Form 20-F filings. In his remarks dissenting from the adoption of the amendments, Commissioner Uyeda emphasized that the new requirements for FPIs represent a break from the SEC's traditional deference to home country disclosure standards. Commissioner Uyeda expressed concern that these amendments could signal to international partners that the U.S. no longer respects the principles of mutual recognition and international comity which facilitate streamlined access to international securities markets. As such, Commissioner Uyeda expressed

concern that these amendments could lead to a decline in the number of foreign companies listed in the U.S. and increase compliance costs for U.S. companies with international operations, ultimately harming U.S. investors and consumers.

2. *Listed Closed-End Funds.* Listed closed-end funds will be required to provide the disclosures described above under the new amendments semi-annually beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024. Prior to the adoption of these amendments, listed closed-end funds were required to disclose semi-annually any company repurchases, aggregated on a monthly basis.

Considerations and Next Steps

Expect interpretive issues and (hopefully) guidance. The SEC noted that companies can continue to rely on the Commission Staff's existing "Compliance and Disclosure Interpretations" addressing whether certain transactions are covered by the issuer repurchase disclosure rules. Thus, for example, a company's acquisition of shares that are tendered to pay the exercise price of an employee stock option will continue to be a reportable repurchase, whereas withholding shares to pay taxes on the option exercise or upon vesting of restricted stock units will not be. Nevertheless, as with any new set of regulations, companies should expect a number of interpretive questions to arise. For example, while the instructions to the checkbox requirement state that companies generally can rely on Section 16 filings in determining whether they need to check the box, it is unclear whether transactions that are exempt from Section 16 reporting, such as dividend reinvestments and 401(k) plan transactions, trigger the checkbox requirement. While the Division of Corporation Finance has continued to express its willingness to address questions arising under its rules, guidance on recently adopted rules has been slow and sparse. Therefore, companies should closely review the new disclosure requirements in the near term and assess whether there are questions on how the rules apply to their own particular repurchase practices, so that the issues can be carefully vetted with in-house and outside counsel.

Companies will need to carefully consider and appropriately revise disclosures regarding the "objectives or rationales" for share repurchases. The SEC emphasized that a company's discussion of its objective or rationales for repurchases should not be "boilerplate." Indeed, the rules contemplate that different objectives or rationales could apply to different repurchases reported in the same quarterly report. For example, repurchases under equity compensation plans will have a different rationale than open-market repurchases designed to return excess capital to shareholders. Thus, it will be necessary for companies to tailor and adjust their disclosures from time to time as appropriate. In this regard, the SEC's adopting release provides some examples of the types of topics that may be included in such disclosures, such as discussing how repurchases fit within the company's capital allocation plans, whether repurchases were driven by a view that the company's stock was undervalued, or addressing the source of funds for repurchases (such as whether proceeds from the disposition of a business unit were utilized to fund repurchases). We expect that for many companies with ongoing repurchase programs designed to return excess capital to investors, these "objectives or rationale" disclosures may not vary from quarter-to-quarter. Nevertheless, companies should establish disclosure controls to ensure that such disclosures are reviewed and confirmed or adjusted as appropriate each quarter. In addition, companies will want to ensure that comments by their executives on earnings calls and at other venues regarding the company's share repurchases are consistent with the disclosures in their Forms 10-Q and 10-K.

Companies should document their processes for implementing share repurchases. The insider trading rule amendments adopted by the SEC in December 2022 require companies to file as exhibits to their Form 10-K any insider trading policies and procedures applicable to purchases and sales of the company's securities by the company. While the SEC Staff has informally indicated that this insider trading policy

exhibit requirement applies to calendar year companies starting with their 2024 Form 10-Ks, the new share repurchase rules require companies to disclose the "process or criteria used to determine the amount of repurchases" starting with calendar year companies' 2023 Form 10-K. Companies should therefore bear in mind these separate but related disclosure requirements as they prepare to describe their processes around share repurchases.

Companies should consider whether to establish policies or procedures relating to the purchase or sale of shares by officers and directors during the time that a company's repurchase program is active. Many companies with active and ongoing share repurchase programs do not preclude sales by executives and directors while the companies' repurchases are ongoing. We believe allowing insider transactions in this context is entirely appropriate, and view the potential for abuse in these situations as largely theoretical. Moreover, compliance with Rule 10b-18, which is a safe harbor designed to prevent issuer repurchases from pushing up a company's stock price, should provide additional comfort that same-day insider sales and company repurchases are not designed to benefit insiders, as should the use of Rule 10b5-1 trading plans. However, with the advent of trade-day reporting by companies, companies should expect that there will be greater scrutiny by the SEC, shareholders, and the press of insider sales and company repurchases that occur on the same day. Therefore, to the extent they do not already do so, companies should monitor and keep track of their insiders' open market transactions, whether pursuant to Rule 10b5-1 plans or otherwise, so that they can evaluate the risks of corporate actions or significant announcements that might be viewed as questionable in hindsight. Companies also may want to consider whether to develop policies or procedures addressing potential appearance issues that could arise if they are effecting relatively isolated or unusually large repurchases (other than pursuant to a company's Rule 10b5-1 buyback plan) on the same day as significant sales by insiders, particularly if those sales are effected by the CEO or by executives who might be expected to be involved in managing the company's repurchase program, such as the CFO.

Exhibit: Tabular Disclosure Format

ISSUER PURCHASES OF EQUITY SECURITIES

Use the checkbox to indicate if any officer or director reporting pursuant to Section 16(a) of the Exchange Act (15 U.S.C. 78p(a)), or for foreign private issuers as defined by Rule 3b-4(c) (§ 240.3b-4(c) of this chapter), any director or member of senior management who would be identified pursuant to Item 1 of Form 20-F (§ 249.220f of this chapter), purchased or sold shares or other units of the class of the issuer's equity securities that are registered pursuant to section 12 of the Exchange Act and subject of a publicly announced plan or program within four (4) business days before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purcha	(d) Average Price per Share (or Unit)	(e) Total Number of Shares (or Units) Purcha	(f) Aggregate Maximum Number (or Approximate	(g) Total Number of Shares (or Units) Purcha	(h) Total Number of Shares (or Units) Purcha	(i) Total Number of Shares (or Units) Purcha

		sed		sed as Part of Publicly Announced Plans or Programs	Dollar Value of Shares or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	sed on the Open Market	sed that are Intended to Qualify for the Safe Harbor in Rule 10b-18	sed Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
[insert additional rows as necessary for each day on which a repurchase was executed]								
Total:								

The following Gibson Dunn attorneys assisted in preparing this update: Ronald O. Mueller, James J. Moloney, Maggie Valachovic, Nicholas Whetstone, and Chris Connelly.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders of the firm's Securities Regulation and Corporate Governance or Capital Markets practice groups:

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