



**STOCK BUYBACKS:
WHAT YOU NEED TO KNOW
(AND DISCLOSE)
FOLLOWING ADOPTION
OF THE SEC'S NEW RULES**

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NEW RULES
BACKGROUND AND
SUMMARY

01

Background on New Share Repurchase Disclosure Rules

On May 3, 2023, in a 3-to-2 vote, the SEC adopted **amendments to the disclosure requirements relating to companies' repurchases of their equity securities** registered under the Exchange Act (the "New Rules").

The premise underlying the New Rules is that, "because issuers are not required to report daily repurchase transactions or provide additional qualitative disclosures about those transactions, **it can be difficult to determine whether repurchase timing may have been motivated, at least in part, by factors other than long-term value maximization.**"

Examples of "other" motivations could be, according to the SEC based on its review of the academic literature:

- achieving certain accounting metrics, such as meeting EPS targets by reducing the number of shares outstanding;
- adjusting timing of announcements of repurchase plans to increase returns on insider equity sales; or
- conveying "personal benefit" to executives.

The New Rules **relate to disclosure only** and do not impose any new limitations or other restrictions (e.g., caps, blackout periods, cooling-off period under a company's Rule 10b5-1 trading plan) on share repurchases. New information will permit investors to analyze "**patterns in repurchases.**"

Summary of New Share Repurchase Disclosure Rules

For companies that file on **domestic forms**, the New Rules will require a company to:

1. disclose **daily repurchase data in a new table filed as an exhibit** to Form 10-Q and Form 10-K;
2. indicate by a **checkbox** whether any **executives or directors traded** in the company's equity securities **within four business days** before or after the **public announcement of a repurchase plan or program** or the announcement of an increase of an existing share repurchase plan or program;
3. provide **narrative disclosure** about the company's repurchase program, including its objectives and rationales, in the filing; and
4. provide quarterly disclosure regarding the **company's adoption or termination of any Rule 10b5-1 trading arrangements, per new Reg. S-K Item 408(d)**.

The New Rules will apply to Forms 10-Q or Forms 10-K filed for the first full fiscal quarter beginning on or after October 1, 2023. For a calendar year company, this means that the new disclosures will **first appear in its 2023 Form 10-K for activity occurring during Q4 2023**.

Other than #4 above, **foreign private issuers** must comply starting with a **new Form F-SR for the quarter ending June 30, 2024**.

**QUARTERLY DISCLOSURE
OF DAILY REPURCHASE
INFORMATION IN NEW
EXHIBIT**

02

Tabular Presentation of Daily Repurchases

Beginning with the **first full fiscal quarter beginning on or after October 1, 2023** (which for a calendar year company is the 2023 Form 10-K), for a company that files on domestic forms, instead of reporting share repurchase data by month in the body of the filing, a company's Forms 10-Q and Forms 10-K will include a **new exhibit in XBRL-tagged format (Exhibit 26)** with a table reporting the noted information for each day on which shares were repurchased.

Asterisks indicate information currently reported on an aggregated monthly basis for each month of the quarter.

01	Date that the purchase of shares is executed
02	Class of shares repurchased
03*	Average price paid per share
04*	Total number of shares purchased
05*	Total number of shares purchased as part of a publicly announced plan
06*	Aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under the publicly announced plan
07	Number of shares purchased on the open market
08	Number of shares purchased in transactions intended to qualify for the safe harbor in Rule 10b-18
09	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

Checkbox Requirement for Officer and Director Trades Close in Time to Public Announcement of Repurchase Plan

Companies will be required to include in the new exhibit 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 a stock repurchase plan or program**, or the announcement of an increase in the number or amount of securities authorized to be purchased under an existing plan or program.

(N.B.: What constitutes an **announcement** of a stock repurchase plan or program **has not been defined by the SEC**, so such term could capture more than just the one-time/first-time announcement of the board's approval of a stock repurchase plan.)

The SEC believes this checkbox requirement will help investors assess whether the issuer or its insiders are potentially engaged in self-interested or otherwise inefficient repurchases. 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**.

Companies that regularly engage in share repurchases typically announce a stock repurchase plan or program **once every 12 to 18 months**.

Sample of New Exhibit 26

We believe that Exhibit 26 can be omitted for quarters in which there were no company repurchases and no need to check the box during the period covered by the report, although the SEC has not expressly addressed this point.

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)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Execution Date	Class of Shares (or Units)	Total Number of Shares (or Units) Purchased	Average Price 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)
[insert additional rows as necessary for each day on which a repurchase was executed]								
Total:								

**QUARTERLY NARRATIVE
DISCLOSURE OF
OBJECTIVES AND POLICIES**

03

Narrative Disclosure - New Requirements

The New Rules require **narrative disclosures regarding repurchases during the quarter**, with XBRL block text tagging and detail tagging of the required narrative and quantitative information.

The Forms 10-Q* and Forms 10-K* must now disclose the following and refer to the particular repurchases in Exhibit 26 to which the narrative relates, if applicable:

- the objectives or rationales for each share repurchase plan or program;
- the process or criteria used to determine the amount of the 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 purchases and sales of the company's securities by its officers and directors during a repurchase program, including whether there are any restrictions on such transactions.

* The Form 10-Q disclosure is under Part II, Item 2, captioned "Unregistered Sales of Equity Securities, Use of Proceeds, and Issuer Purchases of Equity Securities," and the Form 10-K disclosure is under Part II, Item 5, captioned "Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities." Each Item name has been updated by the New Rules to address the "Issuer Purchases of Equity Securities" topic.

SEC Guidance on New Narrative Disclosure Requirements

The SEC's Adopting Release indicates that the SEC expects that the narrative disclosure regarding "objectives or rationales" for share repurchases should **avoid "boilerplate" language** and "must provide investors with **sufficiently detailed information to evaluate an issuer's share repurchases.**"

Item 703(a) specifies that this information must **"refer to the particular repurchases in the table . . . that correspond to the different parts of the narrative."**

The Adopting Release provides a non-exhaustive list 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;
- discussing the expected impact of the repurchases on the value of remaining shares;
- addressing the sources of funds for repurchases (such as "where the source of funding results in tax advantages that would not otherwise be available for a repurchase"); or
- addressing "the factors driving the repurchase, including whether their stock is undervalued, prospective internal growth opportunities are economically viable, or the valuation for potential targets is attractive."

Narrative Disclosure - Continuing Requirements

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.

While the above information **historically has been required in a footnote** to the monthly quantitative share repurchase disclosure table, the New Rules instead require that this disclosure be included in the **main text of the narrative discussion** (as the monthly table will no longer exist), which will be located in the same Items in the Forms 10-Q* and Forms 10-K* as the new narrative disclosures.

* The Form 10-Q disclosure is under Part II, Item 2, captioned "Unregistered Sales of Equity Securities, Use of Proceeds, and Issuer Purchases of Equity Securities," and the Form 10-K disclosure is under Part II, Item 5, captioned "Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities." Each Item name has been updated by the New Rules to address the "Issuer Purchases of Equity Securities" topic.

**QUARTERLY DISCLOSURE
OF COMPANY 10b5-1 PLAN
ACTIVITY**

04

Disclosure Requirements for Rule 10b5-1 Plans

In December 2022, the SEC adopted amendments requiring 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 quarterly disclosure regarding any Rule 10b5-1 plan adopted or terminated **by the company**.

Similarities

As with Rule 10b5-1 trading plans adopted by an executive or director, the company will be required to **disclose the material terms (other than price) of any Rule 10b5-1 plan the company has adopted**, including:

- 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 pursuant to the arrangement.

The information must be reported using **XBRL tagging**.

Differences

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**."

The SEC also stated that it is **not imposing additional conditions on the availability of the Rule 10b5-1 affirmative defense for companies**, such as a cooling-off period, limitations on the use of multiple overlapping plans, or limitations on the use of single-trade plans.

**TIMING AND FORM
REQUIREMENTS FOR
FOREIGN PRIVATE ISSUERS**

05

Foreign Private Issuers (“FPIs”)

Tabular and Checkbox Disclosures

Prior to the adoption of the New Rules, FPIs were required to **annually** disclose on Form 20-F any company repurchases, aggregated on a monthly basis.

Under the New Rules, **beginning with the first full fiscal quarter that begins on or after April 1, 2024**, 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 Forms 10-K will be required to file the **new Form F-SR containing the tabular and checkbox disclosures on a quarterly basis**, within 45 days after the end of each quarter.

Narrative Disclosures

The **narrative disclosure that relates to the Form F-SR filings** will be required in FPIs’ **Form 20-F filings**, beginning with the first Form 20-F filed after the first Form F-SR has been filed.

Checkbox Burden

Because Exchange Act Section 16 does not apply to FPIs, **FPIs will have a larger burden** in collecting the information necessary to comply with the checkbox requirement than other issuers.

Break from Historical Practice

As highlighted by Commissioner Uyeda in his remarks dissenting from the adoption of the New Rules, the new requirements for FPIs represent a **break from the SEC’s traditional deference to home country disclosure standards**.

Commissioner Uyeda expressed concern that the New Rules 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.

1% SHARE REPURCHASE EXCISE TAX

06

The New 1% Share Repurchase Tax

Overview

Effective January 1, 2023, a **new 1% federal excise tax applies to the net amount of certain stock “repurchases”** (and economically similar transactions) by corporations whose stock is “traded on an established securities market.”

- On December 27, 2022, the IRS and Treasury issued a notice providing important initial guidance on the application of this excise tax.
- In March 2023, President Biden proposed increasing the tax rate to 4%.

Net Computation

In computing the tax base, taxpayers are **allowed to net the FMV of stock issued by the corporation** during the taxable year (e.g., stock issued for cash).

Stock withheld or repurchased to settle withholding tax obligations on employee grants is typically **exempt** because buybacks are netted against the granted shares.

Stock issued as consideration in acquisitive transactions can be netted by the acquiror, subject to limitation in the case of targets subject to the tax.

Exceptions

There are **several exceptions** to the application of the tax, including:

- if stock repurchased (or an amount of stock of equivalent value) is contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan;
- repurchases by a regulated investment company or REIT; and
- any case in which the total value of the stock repurchased during the taxable year does not exceed \$1,000,000.

Unexpected Applications

The new tax presents **unexpected applications in various contexts**, such as:

- Targets in acquisitions: Partially tax-free and leveraged corporate acquisitions.
- Preferred stock repurchases (even if redeemed pursuant to terms of preferred stock).
- Buybacks by “private” entities with shares traded on an established securities market.

CONSIDERATIONS AND NEXT STEPS

07

Analyzing Data for Patterns

The key issue raised by the New Rules is whether an analysis of daily repurchase activity shows **patterns** that, **“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.”**

For example:

- Significant repurchases conducted in the days immediately before the end of a fiscal quarter could indicate that an issuer was realizing that it might not meet its EPS target and was therefore trying to reduce the amount of shares outstanding – in contrast to an issuer that repurchases an equal amount of shares each day of the quarter.
- Repurchases immediately before sales by executives could indicate that the issuer was trying to support the share price in order to maximize the amount of the executives’ sale proceeds.

Is the daily pattern consistent with the stated purpose for the repurchases?

Issuers should examine whether an analysis of their daily repurchase activity information – **or a comparison to executives’ purchases and sales during the quarter** – could lead investors to draw negative inferences. If so, they should consider whether to provide an explanation or other disclosure so as to rebut any possible negative inferences.

Interpretive Issues and Guidance

The SEC noted that **companies can continue to rely on the Staff's existing "Compliance and Disclosure Interpretations"** addressing whether certain transactions are covered by the issuer repurchase disclosure rules.

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**. As a result, 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.

Action Items

Implement New Controls and Procedures to Capture New Required Information

To comply with the qualitative narrative disclosure requirements in Item 703(a), issuers will likely need to adopt new disclosure controls and procedures. Issuers will be required to disclose the “objectives or rationales for each repurchase plan or program,” **including “the particular repurchases in the table . . . that correspond to the different parts of the narrative.”**

To the extent that an issuer has multiple objectives or rationales for its share repurchases – and the entire rulemaking is premised on the idea that long-term value maximization is not the sole or exclusive rationale for issuer share repurchases – then **the issuer would need to keep track of which daily repurchases are in furtherance of which particular objective or rationale**, which means implementing new controls and procedures to capture such information.

Monitor Insiders’ Open Market Transactions

We believe allowing insider transactions during active and ongoing company share repurchase programs is appropriate and view the potential for abuse in these situations as largely theoretical. Moreover, compliance with Rule 10b-18 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, companies should **expect greater scrutiny by the SEC, shareholders, and the press of insider sales and company repurchases occurring on the same day**. Therefore, to the extent they do not already do so, companies should **monitor and keep track of insiders’ open market transactions** (under 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.

Consider Policies or Procedures to Address Potential Appearance Issues

Companies 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.

Companies are required to disclose “any policies and procedures relating to purchases and sales of the issuer’s securities by its officers and directors during a repurchase program, including any restrictions on such transactions.”



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