

SEC Proposes Amendments to Share Repurchase Disclosure Rules and to Rule 10b5-1 Insider Trading Plans

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On December 15, 2021, the Securities and Exchange Commission (SEC) announced proposals for [amendments to share repurchase disclosure rules](#) as well as [amendments to Rule 10b5-1 insider trading plans](#). Although the two sets of proposals were released separately, the proposals similarly address concerns by the SEC regarding correcting apparent information asymmetries in securities trading and enhancing transparency.

The amendments to the share repurchase disclosure rules would require that a public company provide a more rapid disclosure using a new “Form SR” regarding purchases of its securities for each day that it makes a share repurchase. Further, the proposed amendments also require enhanced periodic disclosures relating to share repurchases. The SEC intends that the amendments would, if adopted, lessen any information asymmetries between issuers and investors by improving the timeliness and granularity of disclosures.

The amendments to Rule 10b5-1 insider trading plans would add new requirements to utilize the affirmative defense to insider trading liability contained in Rule 10b5-1 as well as enhance public disclosure by issuers and insiders of the trading plans. The proposed amendment aims to help shareholders understand when and how insiders are trading in securities at times when they may have material nonpublic information.

The public comment period for the proposals expired on April 1, 2022.

I. Share Repurchase Rule Proposal

The proposed amendments regarding share repurchases pertain to the existing SEC rules for disclosures about purchases of an issuer’s equity securities by or on behalf of the issuer or an affiliated purchaser, also known as share buybacks. The proposed amendments would apply to those issuers that repurchase securities issued pursuant to Section 12 of the Securities Exchange Act. Under the current rules regarding share repurchase disclosures, issuers are required to disclose the following on a quarterly basis: (i) the total number of shares purchased by the issuer, (ii) the average price paid per share, (iii) the total number of shares purchased as part of a publicly announced repurchase plan, and (iv) the maximum number of shares (or approximate dollar value) that may yet be purchased under the plans or programs. The proposed changes would require more detailed and more frequent disclosures and the use of Inline XBRL to allow for better comparisons among companies. The proposed rules would also require footnote disclosure of the principal terms of all publicly announced repurchase plans, the number of shares purchased other than through a publicly announced plan, and the nature of the transaction.

a. Proposed Form SR Next Day Reporting

The proposed rule amendments would establish a new Form SR to report daily share repurchases.¹ This would require an issuer to report any purchase made using a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase. The proposed Form SR would require the issuer to disclose: (i) the date of the repurchase, (ii) the class of securities purchased, (iii) the total number of shares purchased, whether or not made pursuant to publicly announced plans, (iv) the average price paid per share, (v) the aggregate total number of shares purchased on the open market, (vi) the aggregate total number of shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18, and (vii) the aggregate total number of shares purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c). The total number of shares purchased on the open market includes all shares repurchased by the issuer in open market transactions, and does not include shares purchased in tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or other transactions. The SEC intends that requiring disclosure of the number of shares purchased in reliance on the non-exclusive safe harbor in Rule 10b-18 and pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) to better enable investors to understand how an issuer has structured its repurchase activity.

Proposed Form SR would be required to be furnished electronically through the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. The proposal would require that companies "furnish," and not "file," Form SR. Also notable, the Form SR would supplement, not replace, the current quarterly repurchase disclosures.

b. Quarterly Disclosure Requirements

In addition to the new Form SR, the proposed amendments would also require enhanced periodic quarterly disclosures. For example, the proposed rules would require an issuer to disclose: (i) the objective or rationale for its share repurchases and the process used to determine the amount of repurchases, (ii) any policies regarding the purchases and sales of the issuer's securities by its officers and directors during a repurchase program, (iii) whether repurchases were made pursuant to a plan to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c), (iv) whether repurchases were made in reliance on the Exchange Act Rule 10b-18 non-exclusive safe harbor, and (v) whether any officers or directors purchased or sold shares of the class of the issuer's equity securities that is the subject of an issuer share repurchase plan within 10 business days before or after the announcement of the plan.

c. Commissioners' Dissents and Review of Comments

SEC Commissioners Hester Peirce and Elad Roisman disapproved of the proposed disclosure requirement as "unnecessarily frequent" and "overly burdensome" among other things. The Commission appears to be studying the comments closely since the comment period ended five months ago and no Adopting Release has been issued yet.

The proposed amendment to share repurchases, with the shift to daily reporting obligations and enhanced disclosure requirements, could impact the way companies approach buybacks. Because the daily reporting obligations will increase regulatory activities for companies, buybacks may become a less appealing or less frequently used method to return capital to shareholders.

¹ The SEC requested comments to discuss the possibility of a *de minimis* exception to the Form SR reporting requirement for share repurchases below a certain threshold, such as share number or dollar value.

II. Rule 10b5-1 Insider Trading Plan Proposal

Rule 10b5-1 of the Securities Exchange Act of 1934 prohibits the purchase or sale of a security using material nonpublic information, referred to as insider trading. However, Rule 10b5-1 provides an affirmative defense to insider trading liability when the person (individual or company) executing the planned transaction does so according to a plan that was made in good faith when the person was unaware of any material nonpublic information. The proposed amendments by the SEC would add new conditions to the availability of the affirmative defense to insider trading liability under Rule 10b-5 as well as enhanced disclosure requirements for companies.

a. Proposed Amendments to Rule 10b5-1

The proposed amendments include: (i) trading arrangements entered into by corporate officers or directors must include a 120 day cooling-off period before trading may commence after its adoption, including adoption of a modified trading arrangement, (ii) trading arrangements and modified trading arrangements entered into by issuers must include a 30 day cooling-off period before trading may commence after their adoption, (iii) officers and directors must certify they are not aware of material nonpublic information about the issuer or its security when adopting the trading arrangement, (iv) the affirmative defense pursuant to Rule 10b5-1 will not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities, (v) 10b5-1 trading arrangements to execute a single trade will be limited to one plan per 12 month period, and (vi) trading arrangements must be entered into and operated in good faith.

b. Enhanced Disclosure Requirements

The proposed amendments would also require enhanced disclosure requirements, including: (i) a requirement for an issuer to disclose in its annual reports whether or not (and if not, why not) the issuer adopted insider trading policies and procedures, (ii) a requirement for an issuer to disclose in its annual reports its option grant policies and practices, as well as showing grants made within 14 days of the release of material nonpublic information and the market price of the underlying securities on the trading day before and after the release of such information in a tabular format, (iii) a requirement for an issuer to disclose in its quarterly reports the adoption or termination of Rule 10b5-1 trading arrangements by corporate insiders and that issuer, and (iv) a requirement that Section 16 officers and directors disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement.

The proposed amendments would also require corporate insiders to disclose bona fide gifts of securities on Form 4. In his statement of support of the proposal, Chair Gensler stated that “charitable gifts are subject to insider trading laws.”

The proposed amendments would likely make it more difficult than it already is for corporate executives to achieve liquidity from their equity. Also, the amended rules, if adopted, will demand more information to be disclosed on a timely basis. Companies may need to begin to identify now how they would handle the increased regulations and disclosure requirements. Further, because these proposals display the main areas of concern the SEC has regarding Rule 10b5-1 plans, companies may benefit from using the proposals to review their current insider trading policies and the timing of their option grants to identify any weaknesses.

For questions regarding the SEC's rule proposals for share repurchase disclosure and rule amendments to Rule 10b5-1 insider trading plans and related changes, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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