

The SEC Adopts New Buyback Disclosure Rules

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The Securities and Exchange Commission (SEC) recently adopted [final rules](#) related to the disclosure of issuers' share repurchases or buybacks designed to provide investors with enhanced information about such buybacks. For purposes of this Alert, we will focus solely on how these rules will impact domestic issuers, which includes emerging growth companies and smaller reporting companies. The new rules will require domestic issuers to:

- Disclose daily repurchase activity on a quarterly basis;
- Check a box indicating whether certain directors or officers traded in relevant securities within four business days before or after the public announcement of an issuer's repurchase plan or program;
- Provide narrative disclosure about the issuer's repurchase programs and practices in its periodic reports; and
- Provide quarterly disclosure in an issuer's periodic reports on Forms 10-K and 10-Q related to an issuer's adoption and termination of 10b5-1 trading arrangement.

SEC Chair Gary Gensler stated that through "these disclosures, investors will be able to better assess issuer buyback programs." SEC Commissioner Peirce criticized the new disclosures as "immaterial disclosures without sensible exemptions," and believes the disclosure of daily repurchase information "will bury [investors] in an avalanche of trivial information." Within two weeks of adoption, the Chamber of Commerce and others filed litigation in the Fifth Circuit to prevent the implementation of these rules for not following appropriate procedures under the Administrative Procedure Act and as a violation of the First Amendment of the Constitution arguing that the disclosure of the rationale and objectives of such programs constitutes compelled commercial speech. Nevertheless, issuers should plan on these rules taking effect later this year.

Overview of New Disclosure Requirements

The new rules, as adopted, require disclosure about daily repurchases on a quarterly basis rather than within one business day as originally proposed. New exhibit 26 containing daily repurchase activity will be deemed to be "filed" rather than "furnished" as originally proposed, which makes this exhibit subject to liability under Section 18 of the Exchange Act and the information will be deemed incorporated by reference into filings under the Securities Act making it subject to liability under Section 11 of the Securities Act. The SEC eliminated the existing requirements to disclose repurchases on a monthly basis in periodic reports. The new rules require Inline XBRL tagging of the information in the table in new exhibit 26.

Quarterly Disclosure of Daily Repurchase Activity

Domestic companies must provide tabular disclosure of daily repurchase activity on a quarterly basis in a new exhibit 26 to their Form 10-Ks and 10-Qs, including the following for each day:

- Class of securities;
- Total number of shares purchased;
- Average price paid per share;
- Total number of shares purchased as part of a publicly announced plan;
- Aggregate maximum number of shares that may yet be purchased under such a plan;

- Total number of shares purchased on the open market; and
- Total number of shares purchased that are intended to qualify under the Rule 10b-18 safe harbor and, separately, pursuant to 10b5-1 plans.

Checkbox Related to Trading of Section 16 Officers or Directors

Domestic issuers will be required to include a checkbox above the table in Exhibit 26 to indicate whether Section 16 officers or directors traded in shares that are the subject of an issuer buyback plan or program within four business days before or after the announcement of that plan or program on a quarterly basis. Issuers may rely on Section 16 filings and representations by officers and directors in this regard, unless they know or have reason to believe that a form was not filed or filed incorrectly.

Disclosures Related to 10b5-1 Trading Arrangements of Issuers

Under new Item 408(d) of Regulation S-K, domestic issuers will also be required to disclose in a footnote to this table, the date of adoption or termination (and, potentially, modification) of any of their Rule 10b5-1 trading arrangements for share repurchases that are intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Narrative Disclosure Regarding Issuer Buybacks

In addition to the daily purchase activity in exhibit 26, domestic issuers will be required to provide new narrative disclosure regarding buyback plans and programs, including:

- for publicly announced buyback plans or programs, (i) the date each plan or program was announced, (ii) the dollar amount (or number of shares) approved, (iii) the expiration date of each plan or program, (iv) the expiration of each plan or program during the period covered by the table in exhibit 26, and (v) each plan or program the issuer has determined to terminate prior to expiration or under which no further purchases are intended;
- the number of shares purchased other than through a publicly announced plan or program, and the nature of such transactions, such as tender offers, open market purchases, tax withholding of shares upon vesting of equity awards or other transactions;
- objectives and rationales for their share repurchases and the process or criteria used to determine the amount of repurchases; and
- any policies and procedures relating to trading in the issuer's securities by their officers and directors during a buyback plan or program, including any restrictions on such transactions.

Compliance Date

Domestic Issuers will be required to comply with the new disclosure requirements in their Forms 10-K (for the 4th fiscal quarter) and 10-Q beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For calendar year-end companies, the first disclosures will be in the Form 10-K for the year ended December 31, 2023 covering repurchases during the fourth quarter of 2023.

What Now?

Given the expected increase in scrutiny of issuer buybacks, we recommend that companies consider taking some or all of the following actions before the fourth quarter of this year:

Update Disclosure Controls and Procedures

- Provide for the collection of the information required by exhibit 26 under the new rules and the appropriate calculations;
- Confirm how to determine the number of shares purchased on any given day with any brokers executing the issuer's plan as well as how to count the number of shares purchased under an accelerated share purchase program (ASR) and shares withheld for tax obligations under equity compensation plans such

as options, restricted stock and the like;

- Begin to craft the disclosures that will describe the objectives or rationales of your buyback plan or program and the process or criteria used to determine the amount of repurchases, including whether the shares are undervalued, alternative uses of the funds (capital expenditures, loan payments, acquisitions, dividends among other things) and the source of funding such repurchases;
- Ensure that Board minutes properly document the objectives and rationales for buybacks and criteria used to determine the amount of repurchases; and
- Develop controls to minimize any appearance that repurchases are designed to achieve targets used for senior management compensation.

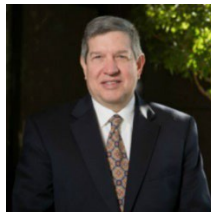
Update Policies

- Consider the need to update policies regarding buybacks, including the use of 10b5-1 trading arrangements and the safe harbor under rule 10b-18;
- Consider restricting insider trading by directors and Section 16 officers, particularly around the announcement of a buyback plan or program (to avoid the need to check the new box in exhibit 26, which may become perceived as weak corporate governance, consider implementing a blackout period;
- If the issuer uses 10b5-1 plans, consider revising such plans to match the requirements imposed on director and officer plans as a best practice (e.g. a cooling off period), now that material terms of such plans will need to be disclosed;
- Consider the use of 10b5-1 plans to minimize the need to suspend repurchases when a material confidential matter, such as a significant acquisition is under consideration, and, if no such plan is in place, consider the need to suspend repurchase activity at the appropriate time; and
- Given the apparent preference of the SEC regarding policies, consider moving any applicable process that currently exists into an appropriate policy.

Miscellaneous

- Begin to educate directors and officers on these new rules and their implications; and
- Be prepared to respond if the market reacts negatively to some aspect of a plan or update plan disclosures if the objectives or rationales of such a plan should change.

For questions regarding the SEC's new buyback rules, please contact your GableGotwals attorney or a member of our [Corporate & Securities Group](#).



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