

## New SEC Share Repurchase Rules for Issuers & Closed-End Funds

On May 3, 2023, the SEC voted three to two along party lines to issue a [final rule](#) updating and modernizing 2003 regulations on share repurchases by issuers, listed closed-end funds, and foreign private issuers (FPIs). The changes require more detailed quantitative and qualitative disclosures. The final rule reflects some significant changes from the proposal based on comment letter feedback, most notably periodic aggregation of daily information versus daily reporting. Issuers will be required to:

- Disclose daily repurchase activity quarterly or semiannually
- Provide narrative disclosure about the issuer's repurchase programs and practices
- Check a box indicating if certain directors or officers traded securities within four business days before or after the public announcement of an issuer's repurchase plan or program
- Provide quarterly disclosure on Forms 10-K and 10-Q about 10b5-1 trading arrangements



### Background

In 2021, share repurchase volume reached nearly \$950 billion, up from \$700 billion in 2020. There are a variety of reasons for share repurchases: shareholder value maximization, to offset share dilution after new stock issuance, to facilitate stock- and stock option-based employee compensation programs, to signal a stock is undervalued, or the issuer's board has concluded that a repurchase program is a prudent use of the issuer's excess cash. Announcements of repurchases and actual repurchase trades also can affect the short-term price and share price- or earnings per share-tied compensation arrangements and could incentivize executives to undertake repurchases to try to maximize compensation.

Issuers may repurchase their shares through open market purchases, tender offers, private negotiated transactions, and accelerated share repurchases. Issuers typically disclose repurchase programs when the plans are authorized by the board of directors. Most share repurchases are then executed over a period of time. Issuers are not required to disclose the specific dates on which they will execute the program's trades. Investors and other market participants normally do not become aware of an issuer's actual share repurchase-related trading activity until they are reported in an issuer's periodic reports, long after the trade execution.

Before the adoption of this rule, Regulation S-K required corporate issuers to disclose, on a quarterly basis, any purchase made by or on behalf of the issuer of shares or other units of any class of the issuer's equity securities that are registered under Section 12 of the Exchange Act aggregated on a monthly basis. The same disclosure was required on an annual basis for FPIs and on a semiannual basis for registered closed-end management investment companies that are exchange traded, known as listed closed-end funds.

## Scope

The final rule covers share repurchases for securities registered under Section 12 of the *Securities Exchange Act of 1934*, which includes corporate issuers, listed closed-end funds, and FPIs.

## Tabular Disclosure

The amendments will require tabular disclosure of an issuer's repurchase activity aggregated on a daily basis and disclosed either quarterly or semiannually. The table will include, for each day:

- The class of securities purchased
- 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
- Aggregate maximum number of shares (or approximate dollar value) that could still be purchased under a publicly announced plan
- The total number of shares purchased on the open market
- Total number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18 and, separately, the total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)

The final rule eliminates the current requirement in Item 703 for disclosure of monthly quantitative repurchase data.

## Frequency

- Corporate issuers that file on domestic forms to disclose the total repurchases made each day for the quarter in an exhibit (rather than in the report body) to their Form 10-Q and Form 10-K (for fourth fiscal quarter)
- Listed closed-end funds to disclose daily quantitative repurchase data in their semiannual and annual reports on Form N-CSR
- FPIs reporting on the FPI forms to disclose daily quantitative repurchase data at the end of every quarter in new Form F-SR, which will be due 45 days after the end of each of the issuer's fiscal quarters

The application of the rule to FPIs deviates from the SEC's historical practice of deferring to an FPI's home country disclosure requirements and may subject FPIs to multiple differing disclosure regimes and discourage foreign companies from listing on U.S. exchanges.

## Narrative Disclosures

New periodic disclosures in 10-Ks, 10-Qs, or Form N-CSR (for listed closed-end funds) would include:

- The objectives or rationales for each repurchase plan and the process or criteria used to determine the repurchase amount
- 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
- Whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and if so, the plan's adoption or termination date
- Whether repurchases were made in reliance on the Rule 10b-18 nonexclusive safe harbor

Disclosure is required in the 10-K or 10-Q of the principal terms of all publicly announced repurchase programs, including:

- The date each plan or program was announced
- The dollar amount (or share or unit amount) approved
- The expiration date (if any) of each plan or program
- Each plan or program that has expired during the period covered by the table
- Each plan or program the issuer has determined to terminate prior to expiration, or under which the issuer does not intend to make further purchases

This information is currently required by Item 703. However, this information is now required in a footnote to the monthly quantitative share repurchase disclosure table that will be eliminated. The information will be included in the main text of the narrative discussion.

## Check the Box

Issuers also will be required to include a checkbox preceding their tabular disclosures indicating whether certain officers and directors purchased or sold shares that are the subject of an issuer share repurchase plan or program within four business days before or after the plan's announcement.

## Rule 10b5-1 Disclosures

In December 2022, the SEC issued a [final rule](#) updating insider trading rules and related disclosures around Rule 10b5-1 plans. For additional details, see **FORsights™** article, "[SEC Updates Rule 10b5-1 on Insider Trading](#)." Part of that proposal that was not adopted is now included in this final rule. New Item 408(d) requires quarterly disclosure in Forms 10-Q and 10-K (for the fourth fiscal quarter) about an issuer's adoption and termination of Rule 10b5-1 trading arrangements. Issuers also must provide a description of the material terms of the contract, instruction, or written plan (other than execution price terms), such as:

- The adoption or termination date of the Rule 10b5-1 trading arrangement
- The duration of the Rule 10b5-1 trading arrangement
- The aggregate number of securities to be purchased or sold under the Rule 10b5-1 program

There may be overlap in the disclosures required by Item 408(d) and by Item 703 of Regulation S-K about Rule 10b5-1(c) programs adopted during the prior fiscal quarter. Item 703 disclosure requirements are triggered only if an issuer had conducted a share repurchase in the prior fiscal quarter. Item 408(d) disclosure is required if a Rule 10b5-1 plan was adopted or terminated, regardless of whether a share repurchase transaction pursuant to that plan actually occurred during the prior fiscal quarter covered by Form 10-Q or Form 10-K. To prevent potential duplicative disclosures, this final rule provides that, if the Item 703 disclosure would satisfy the requirements of Item 408(d), a cross-reference to that disclosure is permitted.

## Compliance Dates

FPIs that file on FPI forms will be required to comply with the amendments in 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.

Listed closed-end funds will be required to comply with the amendments beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

All other issuers will be required to comply with the amendments on Forms 10-Q and 10-K (for their fourth fiscal quarter) beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023.

## Conclusion

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