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SEC Adopts New Share Repurchase Disclosure Rules

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The Securities & Exchange Commission adopted new share repurchase disclosure rules that significantly increase issuers' disclosure obligations by requiring more detailed periodic disclosure about repurchases and issuer trading plans.

Key Takeaways

- The new rules apply to issuers, including foreign private issuers (FPIs) and certain registered closed-end funds that are exchange traded (Listed Closed-End Funds), that purchase shares or other units of any class of the issuer's equity securities that is registered pursuant to Section 12 of the Securities Exchange Act of 1934, as amended
- In a change from the proposal, disclosure of share repurchases will not be required within one business day. However, disclosure about share repurchases on a daily basis will be required periodically (quarterly for domestic issuers and FPIs)
- Enhanced narrative disclosure concerning share repurchases, including the issuer's reasons for conducting share repurchases as well as details about relevant policies and procedures applicable to directors and officers trading during a repurchase program will be required in periodic reports
- Quarterly disclosure regarding issuer adoption and termination of Rule 10b5-1 plans will be required
- Compliance dates vary depending on the type of issuer:
 - Domestic issuers will be required to begin reporting in the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023 (for calendar year end companies, this will be the Form 10-K for fiscal year 2023)
 - 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 (with narrative disclosure required in the subsequent Form 20-F)

- 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

Overview of New Periodic Share Repurchase Disclosure Rules

Current Periodic Disclosure Requirements (for each month)

- Total number of shares (or units) purchased by the issuer or any affiliated purchaser by class
- Average price paid per share (or unit)
- Total number of shares (or units) purchased as part of a publicly announced repurchase plan or program
- Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs

New Periodic Disclosure Requirements (for each day)

- The class of shares
- Average price paid per share
- 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 may yet be purchased under a publicly announced plan
- 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
- Total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)

Additional Requirements and Relevant Information

- The new rules eliminate current requirements in Regulation S-K, Form 20-F and Form N-CSR to disclose monthly repurchase data in periodic reports
 - Instead, for domestic issuers, required quantitative information will be presented in an exhibit to the relevant periodic report (in addition to new narrative disclosure requirements in the report itself)
 - New Form F-SR was adopted for FPI quarterly reporting and will be due 45 days after the end of an FPI's fiscal quarter (in addition to new narrative disclosure requirements in Form 20-F)
- The newly required exhibit and Form F-SR must include a checkbox indicating whether Section 16 officers and directors (or, for FPIs, directors and members of senior management who would be identified pursuant to Item 1 of Form 20-F) purchased or sold shares that are the subject of an issuer share repurchase plan or program within four business days before or after the announcement of that plan or program
- Enhanced narrative disclosure about share repurchases will be required in periodic reports, including:
 - The objectives or rationales for issuer share repurchases and the process or criteria used to determine the amount of repurchases; and
 - Any policies and procedures relating to purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any restriction on such transactions
- Domestic issuers will be required to disclose the adoption and termination of company Rule 10b5-1 trading plans, including material terms of such plans, on a quarterly basis in their periodic reports
- The new disclosure must be data tagged

Practical Considerations and Next Steps

- Issuers will need to set up processes and controls for tracking daily share repurchase activity as well as trades made by directors and officers close in time to the announcement of a share repurchase plan or program
 - For domestic issuers, details about all repurchases must be tracked beginning on October 1, 2023

- Many of the disclosure requirements may be completely new to FPIs – the rules do not exempt FPIs that are not required to report information about share repurchases in their home country
- Issuers should consider discussing with their banks and brokers their ability to track and provide the required information
- In addition to the quantitative data that must be tracked and disclosed, issuers will need to prepare enhanced narrative disclosures that will likely prompt many issuers to evaluate current policies and procedures in place related to trades made by directors and officers while a repurchase program is in place
- Going forward, when considering whether to approve a share repurchase plan or program, the board of directors should consider discussing, and consider including in the relevant resolutions, the objectives or rationales for the issuer’s share repurchases, the process or criteria used to determine the amount of repurchases approved and any officer or director trades made in the days leading up to the board's decision

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Suggested Reading

- 03 March 2023 Kirkland Alert NYSE and Nasdaq Propose Listing Standards to Implement the SEC's Clawback Rules
- 15 December 2022 Kirkland Alert Public Company Updates: SEC Adopts 10b5-1 Trading Plan Rules; Stock Buyback Proposal Comment Period Reopened; New Non-GAAP CDIs
- 17 November 2022 Kirkland Alert Responding to Rule Changes When the Rule Has Not Actually Changed: How Companies Should Approach Shareholder Proposals This Proxy Season

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