

May 8, 2023

SEC adopts changes to disclosure requirements regarding share repurchases and new disclosure requirements regarding issuer 10b5-1 plans

On May 3, 2023, the Securities and Exchange Commission (“SEC”) adopted new disclosure requirements¹ regarding share repurchases. The new requirements include both quantitative and narrative disclosure regarding share repurchases.

In a significant and welcome change from the SEC’s proposed rule,² the new requirements do not require issuers to file quantitative information regarding share repurchases within one business day of each individual repurchase. Instead, the new requirements require the quantitative disclosure to be filed with the SEC on a quarterly (or, for registered closed-end management investment companies that are exchange traded (“listed closed-end funds”), semi-annual) basis, with daily aggregated share repurchase activity reported for the relevant period, instead of on a monthly basis as is currently the case. That disclosure will include a table showing the dates on which repurchases were made, as well as certain other information summarized below. The narrative disclosure requirements have been expanded to require a description of the purposes of the disclosed share repurchases, among other things. In addition, the final rule mandates certain disclosures about Rule 10b5-1 plans adopted by issuers.

The new share repurchase reporting requirements apply only to issuers that file Form 10-Ks and Form 10-Qs (including smaller-reporting companies), foreign private issuers (“FPIs”) that file F-Series Forms (“F-Series Form FPIs”) and listed closed-end funds. For F-Series Form FPIs, the SEC adopted a new form, Form F-SR, for quarterly reporting of share repurchases. The new share repurchase reporting requirements apply to repurchases made by or on behalf of an issuer or an affiliated purchaser of the issuer of shares of any class of the issuer’s equity securities registered under the Securities Exchange Act of 1934.

Quantitative Disclosure Requirements. The new rule requires issuers to file a table showing their repurchase activity each quarter or, for listed closed-end funds, semi-annually. Issuers that file Form 10-Ks and Form 10-Qs will need to include that disclosure as an exhibit to those reports. F-Series Form FPIs will need to disclose their repurchase activity on new Form F-SR. Form F-SR will be due 45 days after the end of each quarter.

The table is required to include the following items for each day on which repurchases were executed:

- The class of shares;
- The average price per share;
- The number of shares repurchased;
- The number of shares repurchased under a publicly announced plan or program;
- The aggregate amount of capacity remaining under the publicly announced plan or program;
- The number of shares purchased on the open market;
- The number of shares purchased that are intended to qualify for the Rule 10b-18 safe harbor; and

¹ SEC Release No. 34-97424 (May 3, 2023) (the “Share Repurchase Adopting Release”). Available at: <https://www.sec.gov/rules/final/2023/34-97424.pdf>.

² SEC Release No. 34-93783 (December 15, 2021) (the “Proposing Release”). Available at: <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

- The number of shares purchased under a plan intended to satisfy the requirements of Rule 10b5-1. Issuers must also include a footnote to the table disclosing the date any such plan was adopted or terminated.

In addition, issuers will be required to check a box if any director or officer³ purchased or sold shares of the relevant class within four business days⁴ of the announcement of a repurchase plan or program or an increase in a repurchase plan or program.

In a change from the proposed rule, the quantitative disclosure will be “filed” rather than “furnished” to the SEC – meaning it will be subject to the same disclosure liability standards as other information included in periodic reports and information incorporated into registration statements.

Expanded Narrative Disclosure Regarding Share Repurchase Activity. The final rules also revise and expand narrative disclosure requirements. Issuers will now be required to disclose:

- The objectives or rationales for their share repurchases and the process or criteria used to determine the amount of repurchases, and
- Any policies or procedures relating to purchases and sales of their securities by their officers and directors during a repurchase program, including any restrictions on such transactions.⁵

Issuers will continue to be required to disclose information regarding publicly announced repurchased plans or programs such as the date the plan or program was announced, the amount approved, the expiration date and any plan or program that expired during the relevant period. However, the disclosure will now be included in the narrative disclosure rather than in footnotes to the tabular disclosure as currently required.

Disclosure About Issuer 10b5-1 Plans. Additionally, the SEC adopted new disclosure requirements regarding Rule 10b5-1 plans by issuers. Issuers that file Form 10-Qs and Form 10-Ks will be required to disclose in Form 10-Qs and Form 10-Ks any Rule 10b5-1 plans they adopted or terminated during the relevant period (the fourth fiscal quarter in the case of Form 10-Ks). F-Series Form FPIs and listed closed-end funds are not subject to these Rule 10b5-1 disclosure requirements. The disclosure is required to include the material terms of those plans, including the duration of those plans, the date they were entered into or terminated and the aggregate number of securities subject to such plans. Although the final rules expressly state that pricing information need not be disclosed, the final rules and the Share Repurchase Adopting Release are silent as to whether or not other potentially sensitive terms (such as timing of trades under the plans) would be considered “material terms” that must be made public.

Timeline for implementation.

- Issuers that file Form 10-Ks and 10-Qs will be required to comply with the new requirements beginning with the filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For a calendar year issuer, that will be the annual report on Form 10-K for the year ending December 31, 2023.
- F-Series Form FPIs will be required to comply with the new Form F-SR reporting requirements beginning with their first fiscal quarter that begins on or after April 1, 2024. For a calendar year issuer, the first Form F-SR will report information for the quarterly period ending June 30, 2024 and will be due 45 days after the end of that quarter. Form 20-F filers must include the new narrative disclosure regarding share repurchases in their annual

³ For F-Series Form FPIs, this will apply to the directors or senior management identified pursuant to Item I of Form 20-F. For other issuers, it will apply to directors and officers required to file Section 16 reports.

⁴ This represents another significant change from the Proposing Release. Under the proposal, the relevant period would have been 10 business days rather than four business days.

⁵ See Share Repurchase Adopting Release at 75.

report on Form 20-F beginning, for calendar year issuers, with the Form 20-F for the year ending December 31, 2024.

- iii. Listed closed-end funds will be required to comply with the new requirements beginning with the Form N-CSR for the first six-month period that begins on or after January 1, 2024. For calendar year issuers, that would be the Form N-CSR for the six-month period ending June 30, 2024.

All of the disclosures required under the new rules are required to be reported using inline XBRL.

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If you would like to follow up regarding any of the matters covered by this Alert, please contact your usual Ropes & Gray attorney.