

# Final SEC Rule on Corporate Buybacks to Expand Reporting Requirements, Especially for FPIs

June 1, 2023

On May 3, 2023, the Securities and Exchange Commission (the “SEC”) adopted rules to require more detailed qualitative and quantitative disclosure from reporting issuers regarding their share repurchases. While the final rules did not include some of the more onerous amendments that were initially proposed, such as daily reporting of share repurchases, the final rules will expand issuers’ reporting obligations and, for foreign private issuers (“FPIs”), require the filing of a new quarterly form with detailed information regarding the prior quarter’s share repurchases.

Implementation of the rules will also require issuers to disclose purchases and sales by their directors and officers around the time of the public announcement of a repurchase plan or program, which could also require new internal control procedures for both domestic issuers and FPIs.

The rules were approved by the SEC on a 3-2 vote, with the two Republican commissioners dissenting.<sup>1</sup>

This memorandum provides a brief summary of the new rules and concludes with some potential implications.

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<sup>1</sup> “Share Repurchase Disclosure Modernization”, Release No. 34-97424 (May 3, 2023) available [here](#) (the “Adopting Release”). The two Republican commissioners dissented, with Commissioner Uyeda criticizing the rule for its dramatic departure from the way the SEC historically has treated FPIs and Commissioner Peirce stressing that the rule “mandates immaterial disclosures without sensible exemptions.”



## I. Amendments to Reporting Requirements

The SEC's new rules are intended to provide investors "with the information they need to better assess the efficiency of, and motives behind, issuer repurchases."<sup>2</sup> Currently, domestic and foreign issuers are required to disclose their aggregate monthly repurchase activity in their Forms 10-Q and 10-K (for domestic issuers) or Form 20-F (for FPIs). According to the SEC, under these current rules, because issuers are not required to report daily repurchases or explain the objective or rationale for their share repurchases, investors are not able to determine whether a share repurchase may have been motivated by "factors other than long-term value maximization."<sup>3</sup> The release discusses the possibility that the timing of repurchases may be influenced, in part, by a desire to achieve certain accounting metrics, to affect executive compensation or to support insiders' trading positions.

The SEC's new rules increase the scope of information required to be disclosed in connection with repurchases of equity securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), including requiring disclosure of more granular data on daily share repurchases and additional qualitative data. For FPIs, these rule changes will also increase the frequency of reporting. In particular, the new rules:

- Require information regarding daily issuer share repurchases to be reported on a quarterly basis for both domestic issuers and FPIs (other than listed closed-end funds, which must report on a semi-annual basis);
- Require domestic issuers and FPIs to indicate by checkbox whether certain officers and directors purchased or sold shares or other units of the class of the issuer's equity securities that are the subject of an issuer share repurchase plan or program

within four business days before or after announcement of the plan or program;

- Require domestic issuers and FPIs to provide additional narrative disclosures regarding the objectives or rationales for their share repurchases and information on share repurchase policies and practices in periodic reports;
- Introduce the new Form F-SR for FPIs to report daily repurchase activity each quarter within 45 days after the end of each fiscal quarter;
- Require domestic issuers to provide a description of the material terms (except for pricing information) of a Rule 10b5-1 trading plan in its Forms 10-Q and 10-K for a quarter when the issuer adopted or terminated the Rule 10b5-1 trading plan; and
- Require such additional information to be reported in inline XBRL.

The SEC believes that periodic disclosure of daily repurchases will enable investors "to evaluate the efficiency of share repurchases or determine a pattern of when repurchases could be timed to affect compensation or to benefit from material nonpublic information," which will increase "investor confidence."<sup>4</sup>

### A. Periodic reporting of daily buyback information

The new rules require issuers, including FPIs and closed-end funds, to file daily quantitative share repurchase data on a quarterly basis (except for closed-end funds, which are on a semi-annual basis) as part of their periodic reporting in the form of a table disclosing, for each class or series of security:

- The date the purchase was executed;
- The class of securities purchased by the relevant issuer (or any "affiliated purchaser" as defined in Rule 10b-18)<sup>5</sup>;

(ii) An affiliate who, directly or indirectly, controls the issuer's purchases of such securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer; *Provided, however*, that "a ffiliated purchaser" shall not include a broker, dealer, or other person solely by reason of such

<sup>2</sup> Adopting Release, *supra* note 1, at p. 19.

<sup>3</sup> Adopting Release, *supra* note 1, at p. 14.

<sup>4</sup> Adopting Release, *supra* note 1, at p. 50.

<sup>5</sup> Rule 10b-18 defines "affiliated purchaser" to mean: "(i) A person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer's securities; or

- Total number of shares (or units) purchased, including whether or not made pursuant to a publicly announced repurchase program;
- Average price paid per share (or unit);
- Total number of shares (or units) purchased as part of publicly announced plans or programs and the aggregate maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plan or program;
- Aggregate total number of shares (or units) purchased on the *open market*;
- Aggregate total number of shares (or units) purchased *that were intended to qualify for the Rule 10b-18 non-exclusive safe harbor*;
- Aggregate total number of shares (or units) purchased *pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)*; and
- By footnote to the daily repurchase table, the date any plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) for the shares was adopted or terminated.

Domestic issuers will provide the daily repurchase information in tabular form each quarter in an exhibit to their Form 10-Q and Form 10-K. FPIs will report their daily repurchase information at the end of every quarter on the new Form F-SR, which will be due 45 days after the end of an FPI's fiscal quarter.<sup>6</sup> The new Form F-SR increases the frequency of required filings by FPIs—previously the annual report on Form 20-F was the only periodic filing required to be filed for FPIs, with Forms 6-K furnished but not filed. Listed closed-end funds will report the daily repurchase information in the body of their annual and semi-annual reports on Form N-CSR.

In a change from the proposed rules, domestic issuers and FPIs must file the daily quantitative repurchase

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broker, dealer, or other person effecting Rule 10b-18 purchases on behalf of the issuer or for its account, and shall not include an officer or director of the issuer solely by reason of that officer or director's participation in the decision to authorize Rule 10b-18 purchases by or on behalf of the issuer.”

data rather than simply furnishing it. Accordingly, issuers will be subject to liability for any false or misleading statement of material facts under Section 18 of the Exchange Act for disclosures made in the form. In addition, the information included in Form F-SR filed by FPIs would be deemed incorporated by reference into filings under the Securities Act of 1933, as amended. Furthermore, late submissions of the Form F-SR would affect the FPI's eligibility to use short-form registration on Form F-3.<sup>7</sup>

## B. Director and officer transactions

The SEC's new rules also require domestic issuers and FPIs to identify, via checkbox, whether certain individuals purchased or sold shares (or other units) of the class of the issuer's equity securities that are the subject of a publicly announced repurchase plan or program within **four business days** before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

For domestic issuers and listed closed-end funds, this requirement applies to any directors and Section 16 officers. For FPIs, whether filing on the forms exclusively available to FPIs or on the domestic forms, this requirement applies to directors or senior management that would be identified pursuant to Item 1 of Form 20-F.

The rules permit domestic issuers and listed closed-end funds to rely on information reported by directors and officers on Forms 3, 4 and 5 in determining whether to check the box for purchases or sales made within four business days of a repurchase plan or program announcement (unless the issuer knows or has reason to believe that a form was filed inappropriately or that a form should have been filed but was not) or on written representations that no Form 5 was required to be filed.<sup>8</sup> FPIs, which are exempt from Section 16 and therefore cannot rely on Forms 3,

<sup>6</sup> If an FPI's home country disclosures furnished on a Form 6-K satisfy the Form F-SR requirements, it can incorporate by reference its Form 6-K disclosures into its Form F-SR

<sup>7</sup> See also discussion of Rule 144 availability for FPIs below.

<sup>8</sup> The release does not address the fact that many listed closed-end funds are exempt from Section 16 and therefore no Forms 3, 4 or 5 are available.

4 or 5, may rely on written representations from its directors and senior management to determine whether to check the box. Any written representations must be retained for two years and made available to the SEC on request.

The SEC's final rule release explains that this checkbox requirement increases transparency by providing investors with information on directors or officers who have traded close in time to the announcement of an issuer's repurchase plan or program.

### C. New narrative disclosure

The new rules revise Item 703 of Regulation S-K, Form 20-F, and Form N-CSR to require additional disclosure about an issuer's share repurchases. Specifically, a domestic issuer or FPI must disclose:

- The objectives or rationales for its share repurchases and the process or criteria used to determine the amount of repurchases;
- Any 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 on such transactions;
- Number of shares (or units) purchased other than through a publicly announced plan or program and the nature of the transaction (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or other transactions); and
- Certain disclosures for publicly announced repurchase plans or 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, and 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.

The Adopting Release clarifies that the objective or rationale for an issuer's share repurchase does not need to include disclosure that would reveal any competitive or sensitive information outside of what may be gleaned from other disclosures regarding the business and financial condition of the issuer. But the issuer must provide investors with sufficiently detailed information, appropriately tailored to an issuer's particular facts and circumstances, to evaluate the purposes for which an issuer's share repurchase was undertaken.

In crafting the narrative disclosure, issuers should avoid boilerplate language. The Adopting Release suggests instead that issuers may include disclosure comparing repurchases with other possible ways to use the funds allocated for such repurchases or discussing the expected impact of the repurchases on the value of the remaining shares. Specifically, the release suggests that issuers "could discuss the factors driving the repurchase, including whether their stock is undervalued, prospective internal growth opportunities are economically viable, or the valuation for potential targets is attractive."<sup>9</sup> Additionally, where material, issuers might discuss the sources of funding for the repurchase.

### D. New Item 408(d) of Regulation S-K

The rules require an issuer filing on Form 10-K or 10-Q (but not an FPI filing on a Form 20-F) to disclose whether during the most recent completed fiscal quarter, the issuer adopted or terminated a Rule 10b5-1 trading plan.<sup>10</sup> If an issuer adopted or terminated a contract, instruction, or written plan then the issuer must disclose:

10b5-1 trading arrangements are defined to include only arrangements adopted by directors or officers not intending to qualify for the Rule 10b5-1 affirmative defense (e.g., a trading plan of an officer or director that does not comply with the required cooling off period). Nonetheless, it seems clear that the rule only requires disclosure of the issuer's Rule 10b5-1 trading arrangements.

<sup>9</sup> Adopting Release, *supra* note 1, at p. 79.

<sup>10</sup> The Adopting Release notes that issuers are not required to disclose information about the adoption or termination of any trading arrangement for the purchase or sale of securities of the issuer that meets the requirements of a non-Rule 10b5-1 trading arrangement, as defined in Item 408(c). This discussion appears a bit confused, because non-Rule

— A description of the material terms of the contract, instruction, or written plan (other than terms with respect to the price at which the party executing the respective trading arrangement is authorized to trade), such as:

- The date on which the registrant adopted or terminated the Rule 10b5-1 trading arrangement;
- The duration of the Rule 10b5-1 trading arrangement; and
- The aggregate number of securities to be purchased or sold pursuant to the Rule 10b5-1 trading arrangement.

If the disclosure provided pursuant to Item 703 contains disclosure that would satisfy the requirements of Item 408(d)(1), a cross-reference to that disclosure will satisfy the Item 408(d)(1) requirements.

## E. XBRL tagging

The new SEC rules require issuers to tag the information disclosed pursuant to Items 601 and 703 of Regulation S-K, Item 16E of Form 20-F, Form F-SR, and Item 14 of Form N-CSR in a structured, machine-readable data language in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. This includes detail tagging of the quantitative amounts disclosed within the required tabular disclosures and block text tagging and detail tagging of required narrative and quantitative information. The SEC believes that Inline XBRL tagging would benefit investors by making these disclosures more readily available and easily accessible to investors and market participants for aggregation, comparison, filtering and other analysis.

## F. Timing for Effectiveness

Issuers will be required to comply with the new rules as follows:

Issuer Type	Compliance Date
All issuers other than those listed below	Forms 10-Q and 10-K: beginning with the first filing that covers the first full fiscal quarter that begins on or after <b>October 1, 2023</b> .

Issuer Type	Compliance Date
	For domestic issuers reporting on a calendar year basis, this will be the fourth quarter of 2023.
FPIs	New Form F-SR: beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after <b>April 1, 2024</b> .  Form 20-F: starting in the first Form 20-F after the FPI's first Form F-SR has been filed.
Listed closed-end funds	Form N-CSR: beginning with the first Form N-CSR that covers the first six-month period that begins on or after <b>January 1, 2024</b> .

## II. Discussion

### A. Implications for FPIs.

#### 1. *Enhancing internal controls and disclosure controls and procedures*

In order to comply with these new rules, FPIs will need to ensure that they are collecting information regarding share repurchases, including director and officer transactions, so that such information will be timely and accurately reported. As described herein, the new rules will require FPIs to:

- File daily quantitative issuer share repurchase data on a quarterly basis on new Form F-SR;
- Identify, via checkbox, whether certain individuals purchased or sold shares (or other units) of the class of the issuer's equity securities that are the subject of a publicly announced repurchase plan or program within **four business days** before or after the issuer's announcement of such repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program; and
- Include additional narrative disclosure about an issuer's share repurchases.

**Form F-SR will be filed, not just furnished.** In a change from the SEC's proposed rules, the new rules



will require the daily repurchase data to be filed instead of furnished. The SEC's view is that the quarterly reporting of daily repurchase data will give issuers more time to obtain, verify and compile the disclosure and thus issuers should be subject to the liability attaching to filed forms for the new repurchase disclosure. This liability regime will be different from the standards FPIs are currently subject to. FPIs that are currently required to provide share repurchase information in their home country disclosures are permitted to furnish that information on Form 6-K unless explicitly incorporated by reference into filings under the Securities Act.

#### **Identifying transactions by senior management.**

The new rules require issuers to indicate by checkbox whether directors, officers or (in the case of FPIs) senior management have purchased or sold shares of the issuer's equity securities within **four business days** before or after the issuer's announcement of a repurchase plan or program (or the announcement of an increase of an existing share repurchase plan or program). In determining whether to check this box, many domestic issuers will be able to rely on disclosures that the relevant directors and officers are already required to make on Forms 3, 4, and 5. However, FPIs are not subject to Section 16 and their directors and officers are not required to report transactions in the FPI shares. The new rules permit FPIs to rely on representations of directors and senior management in determining whether to check the box, so long as such reliance is reasonable.

The new rules are the first to require reporting of transactions by directors and senior management of FPIs who beneficially own less than 5% of the issuer's voting equity securities. Historically, these transactions would have been reported only to the extent required by Schedules 13D or 13G. FPIs should ensure that they have appropriate procedures in place to capture trade information of directors and senior management in order to timely identify, via checkbox, such information on Form F-SR.

#### *2. Filings for quarters with no repurchases*

By its terms, Form F-SR appears to only be required to be filed for quarters where the filing issuer has made

share repurchases (for instance, the instructions to Form F-SR require reporting "[i]f repurchases are made by or on behalf of the registrant or any 'affiliated purchaser'"). However, because an omitted Form F-SR could cause ambiguity as to whether any of the implications of failing to timely file, described below, are triggered, FPIs may wish to file Forms F-SR disclosing no share repurchases for any quarter during which they have not repurchased shares.

#### *3. Implications of failure to timely file Form F-SR*

FPI affiliates and holders of restricted shares (whether or not affiliates) rely on Rule 144 to permit various transactions in the issuer's shares without a registration statement. One of the conditions for availability of Rule 144 in certain instances is that the issuer has filed all required reports under Section 13 or 15(d) of the Exchange Act during the 12 months preceding the proposed sale.<sup>11</sup> Historically, those involved in sales of FPI shares have needed to consider only the FPI's compliance with the annual reporting requirement on Form 20-F to confirm that this condition is met and that Rule 144 may be available. Under the new rules, parties will need to consider an FPI's compliance with both the Form 20-F requirements and the new quarterly requirement on Form F-SR. This will increase the diligence required before entering into a sale of shares of an FPI in reliance on Rule 144, and, if an FPI chooses not to file an F-SR because it has not engaged in repurchases in the prior quarter, it may be unclear that the issuer is current in its public filings.

Similarly, it is a condition to use of Form F-3 for registration of certain securities offerings by an FPI that the FPI has timely filed all materials required to be filed pursuant to Sections 13, 14 or 15(d) of the Exchange Act during the 12 months preceding the proposed registration.<sup>12</sup> Under the new rules, it will be necessary for an FPI to have complied with the quarterly disclosure requirement on Form F-SR, including filing the required Form F-SRs in a timely manner, in order to use Form F-3 for such an offering.

#### **B. Impact on Specific Repurchases Strategies.**

While the application of the new disclosure requirements to traditional open-market repurchase

<sup>11</sup> 17 C.F.R. § 230.144.

<sup>12</sup> 17 C.F.R. § 239.33.

plans is fairly straightforward, issuers may wish to revisit their current practices for disclosing more complex repurchase structures, such as accelerated share repurchases and open-market repurchase plans that make use of trading strategies to repurchase shares at a discount to the market price. Reporting of these more complex transactions will depend on the particularities of the structure (e.g., whether it is documented as an agency transaction or private purchase transaction, when the repurchase price is known and when shares are actually delivered).

For the most part, issuers may take a lead from how they reported these structures under the previously existing monthly repurchase disclosure regime, since the daily repurchase reports effectively only require disaggregating the previously reported monthly data. However, the additional disclosure requirements for material terms of a Rule 10b5-1 repurchase plan will likely require disclosure of further commercial terms of less traditional share repurchase strategies.

### **C. U.S. Chamber of Commerce Lawsuit Against SEC**

On May 12, 2023, the U.S. Chamber of Commerce, the Texas Association of Business and the Longview Chamber of Commerce filed a lawsuit in the U.S. Court of Appeals for the Fifth Circuit seeking review of the issuance of the final rules. Believing that the disclosure requirements “not only risk the public airing of important managerial decisions but also compel speech in violation of the First Amendment,”<sup>13</sup> the plaintiffs seek to challenge the new rules under both the Administrative Procedure Act and the U.S. Constitution. U.S. Chamber Executive Vice President Neil Bradley argues that buybacks improve returns for savers and investors by efficiently distributing capital to where it is “most likely to result in the investments that grow businesses and add value for shareholders and Main Street investors.”<sup>14</sup> With the adoption of these rules, the Chamber expressed concern that it will discourage buybacks and harm investors, rather than

protect them. The SEC has indicated it believes it has undertaken its rulemaking within its authorities and plans to “vigorously defend the challenged ruling in court.”<sup>15</sup>

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<sup>13</sup> <https://www.uschamber.com/finance/u-s-chamber-sues-the-securities-and-exchange-commission-over-stock-buyback-rule>

<sup>14</sup> <https://www.uschamber.com/finance/u-s-chamber-sues-the-securities-and-exchange-commission-over-stock-buyback-rule>

<sup>15</sup> <https://www.reuters.com/legal/us-chamber-commerce-sues-securities-regulator-over-new-share-buyback-rule-2023-05-12/>