

This is a commercial communication from Hogan Lovells. See note below.

Looking ahead to expanded share repurchase disclosure

In May the SEC adopted rule amendments that require reporting companies to disclose in their periodic reports more detailed information about their repurchases of equity securities registered under Section 12 of the Exchange Act. The SEC expects that the additional disclosures will provide investors with “clearer insights” into why and how issuers undertake share repurchases. The disclosures will draw increased investor scrutiny of repurchase programs as well as stock sales by officers and directors during a repurchase program.

The share repurchase disclosure requirements apply to all corporate issuers, including foreign private issuers, with a registered class of equity securities. The amended rules require issuers to disclose each quarter, in a tabular format, quantitative data regarding repurchases during the quarter, aggregated on a daily basis. The new disclosure will replace the current quarterly reporting of aggregated monthly repurchase data.

The amendments further require issuers to provide narrative disclosures about the purpose and operation of their repurchase plans or programs in relation to buyback activity disclosed in the table. As part of this information, the issuer must disclose whether any of its directors or senior officers purchased or sold any of the issuer’s registered equity securities within four business days before or after the public announcement of the adoption of a repurchase plan or program. Domestic issuers also are required to report information regarding their adoption and termination of Rule 10b5-1 trading arrangements in the prior quarter.

Domestic issuers with a December 31 year-end are first required to provide the new disclosure in Form 10-K reports filed in 2024 regarding share repurchases and other reportable matters during the fourth quarter of 2023. Foreign private issuers must provide the

quantitative disclosure in a new Form F-SR filed for each quarter after a transition period ending in 2024, and the narrative disclosures in Form 20-F beginning with the Form 20-F filed after the first Form F-SR filing.

The rule amendments will be effective on July 31, 2023. The SEC’s adopting release (Release No. 34-97424) can be viewed [here](#).

Summary of rule amendments

Quarterly reporting of quantitative share repurchase data

Domestic corporate issuers

The SEC has amended Regulation S-K and Exchange Act forms to prescribe the new share repurchase disclosure requirements for domestic issuers. The disclosure requirements apply to share repurchases completed in both open-market and private transactions.

Frequency. Amended Item 703 of Regulation S-K requires issuers to disclose quantitative share repurchase data on a quarterly basis in their Form 10-Q and Form 10-K reports for repurchases by or on behalf of the issuer and its affiliated purchasers during the prior fiscal quarter.

Location. Issuers are required to disclose the quantitative data in an exhibit to their periodic reports rather than, as under the current rule, in the body of the reports. The exhibit requirement is reflected in Item 601(b) of Regulation S-K as Exhibit 26, captioned “Purchases of equity securities by the issuer and affiliated purchasers.”

Format. The rule amendments require issuers to report daily repurchase data for each quarter in the format presented on the following page:

Purchases of equity securities

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price Paid per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Total Number of Shares (or Units) Purchased on the Open Market	(h) Total Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b-18	(i) 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)
Total								

Quantitative data disclosure. The new disclosures will differ in important respects from the information presented in the table under current Item 703.

- *Daily repurchase activity:* The new presentation requires issuers to disclose their share repurchase data for each day during the quarter. The SEC expects that investors will use the daily repurchase data to evaluate an investor’s repurchases “in the context of other point-in-time disclosures, such as executive compensation and financial statement disclosures.”

The SEC believes that daily quantitative data will help investors assess the motives and effects of stock buybacks, including whether the issuer repurchased shares to promote shareholder value — such as by repurchasing undervalued securities or returning excess cash to shareholders — instead of to achieve other purposes unrelated to the efficient use of cash. The agency highlights such other purposes as including repurchases conducted to boost executive compensation or to enable the issuer to attain financial targets. The SEC states that the more detailed reporting also could help investors determine whether the issuer made large repurchases before it announced material nonpublic information.

- *Reliance on SEC safe-harbor rules:* The rule amendments require issuers to disclose in the table the number of shares repurchased daily in reliance on Exchange Act Rule 10b-18, which provides issuers with a safe harbor from liability for market manipulation, or intended to meet the conditions of Exchange Act Rule 10b5-1(c), which establishes an affirmative defense to Rule 10b-5 liability for insider trading. In addition, issuers must disclose, in a footnote to the daily repurchase table, the date on which they adopted or terminated any repurchase plan intended to satisfy Rule 10b5-1(c)’s affirmative defense provisions.

These disclosures are meant to provide investors additional insight into the structure and operation of repurchase programs, such as by indicating the timing and volume limits of repurchase activity, actions taken to minimize the market impact of repurchases, and efforts by the issuer to avoid repurchases while in the possession of material nonpublic information.

Filed disclosure. Issuers will be required to file, rather than furnish, the quantitative data and related narrative disclosures discussed below. The disclosures therefore will be subject to the liability provisions of

the Exchange Act and, to the extent incorporated by reference into Securities Act filings, the Securities Act that apply to filed information.

Foreign private issuers

The foregoing requirements also generally will apply to foreign private issuers. Foreign private issuers that do not voluntarily file their Exchange Act reports on domestic issuer forms will be required by Exchange Act Rule 13a-21 to disclose daily quantitative repurchase data on a quarterly basis in a new Form F-SR, which will be due within 45 days after the end of each fiscal quarter. If the foreign private issuer's home country disclosures furnished on Exchange Act Form 6-K satisfy the Form F-SR requirements, the issuer may incorporate the Form 6-K disclosures into its Form F-SR.

Quarterly narrative disclosures about share repurchases

The SEC amended Item 703 of Regulation S-K and Form 20-F filed by foreign private issuers to require issuers to provide in periodic reports narrative disclosures about their share repurchase activity. Under Item 16E of Form 20-F, which is filed annually, a foreign private issuer must disclose the specified narrative information with respect to share repurchases disclosed in its Form F-SR reports filed during the fiscal year covered by the Form 20-F.

The SEC intends for the narrative disclosures, when considered together with the quantitative data in the daily repurchase table, to provide investors with context to evaluate an issuer's share repurchases during the quarter. To reinforce the link between the tabular and narrative disclosures, amended Item 703 and amended Form 20-F direct issuers to refer to particular share repurchases disclosed in the relevant table that correspond to the different parts of the narrative.

Repurchase plans and programs. The amended rules require the issuer to disclose:

- the objectives or rationales for each repurchase plan or program 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 by its officers and directors during a repurchase program, including any restrictions on such purchases and sales.

Sounding a theme that pervades its release, the SEC expresses the expectation that, among other benefits,

these disclosures will help investors assess whether managerial self-interest affects repurchase decisions.

The SEC observes that issuers may supplement the required disclosures if they think the disclosures otherwise would present a misleading or confusing picture of the issuer's repurchase program or activity. Further, in response to another concern of commenters, the SEC clarifies that the narrative disclosures do not require issuers to present information at a level of detail that would reveal competitive or sensitive information.

The SEC cautions issuers to tailor the disclosures to their specific facts and circumstances and avoid boilerplate formulations of how their share repurchases compare to other investment opportunities that generate financial returns. The SEC recites "helpful suggestions" from commenters of the types of considerations issuers might discuss, including:

- other possible ways the issuer might have used funds allocated for share repurchases;
- how share repurchases compare with the issuer's investment alternatives, such as capital expenditures and other uses of capital;
- the expected impact of repurchases on the value of shares that remain outstanding; and
- in the discussion of repurchase objectives and rationales, such factors as undervaluation of the issuer's stock, the viability of internal growth or acquisition opportunities for deployment of available funds, and sources of funding for repurchases that would be advantageous from a tax perspective.

The amendments also require issuers to disclose the following additional information:

- the number of shares purchased other than through a publicly announced plan or program;
- the nature of the transaction (such as 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
- consistent with footnote disclosure to the repurchase table presented under current Item 703, the following information concerning publicly announced repurchase plans or programs:
 - the date each plan or program was announced;

- the dollar amount (or share 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.

Transactions by directors and senior officers. In addition, the issuer is required to indicate — by checking a box before the daily repurchase table — whether its directors and senior officers purchased or sold any 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 the repurchase plan or program (including, for this purpose, the announcement of an increase in an existing plan or program).

The disclosure applies to actions by officers of domestic issuers who are subject to reporting requirements under Exchange Act Section 16(a) and officers of foreign private issuers who are identified pursuant to Item 1 of Form 20-F.

The SEC says this disclosure, together with information about any policies and procedures adopted by the issuer relating to this type of trading activity, will inform investors whether the issuer has taken steps to prevent officers and directors from potentially benefiting from issuer repurchases in a manner that is not available to regular investors.

So long as its reliance is reasonable, a domestic issuer may rely on a Section 16 reporting person’s filings on Forms 3, 4 and 5 to determine whether any director or senior officer has engaged in transactions that require checking the box. Because their securities are exempt from Section 16, foreign private issuers may rely on written representations from its directors and senior officers in making this determination.

Disclosure of adoption and termination of Rule 10b5-1 trading arrangements

Some issuers use Rule 10b5-1 trading arrangements to conduct their share repurchases. Domestic issuers are required under a new Item 408(d) of Regulation S-K to provide disclosure about those arrangements that is meant to provide additional insight into their repurchase strategy and the implementation of their previously announced repurchase plans.

Under the new requirement, the issuer must disclose, in each Form 10-Q and in Form 10-K for the fiscal fourth quarter:

- whether, during its last fiscal quarter, it adopted or terminated any Rule 10b5-1 trading arrangement; and
- the material terms of the Rule 10b5-1 trading arrangement — other than the prices at which trades are authorized under the arrangement — such as (i) the date on which the trading arrangement was adopted or terminated, (ii) the duration of the trading arrangement, and (iii) the aggregate number of securities to be purchased or sold under the trading arrangement.

For purposes of the rule, any “modification or change to the amount, price, or timing of the purchase or sale of the securities” underlying a trading arrangement will constitute both a “termination” of the prior arrangement and the “adoption” of a new trading arrangement.

The Item 408(d) disclosures largely parallel those required under Item 408(a) adopted in December 2022 for quarterly disclosures relating to Rule 10b5-1 trading arrangements adopted or terminated by directors or officers, as described in our SEC Update available [here](#).

The SEC notes that issuers must provide Item 408(d) disclosure if they adopted or terminated a Rule 10b5-1 plan during a fiscal quarter, even if they did not repurchase shares under the plan during that quarter. Accordingly, depending on the timing of reportable matters, a periodic report might contain only Item 408(d) disclosure, only Item 703 disclosure, or both Item 408(d) and Item 703 disclosures. When disclosure under both items is triggered, the issuer may report under Item 408(d) by cross-referencing to Item 703 disclosure that contains the required information about plan adoption and termination.

Transition to new reporting requirements

Although the rule amendments will become effective on July 31, the SEC’s transition arrangements defer initial compliance with the reporting requirements until 2024. The initial compliance dates differ based on the issuer’s status.

- *Domestic corporate issuers:* Domestic issuers (as well as foreign private issuers that voluntarily file reports on Forms 10-Q and 10-K) are required to comply with the new requirements beginning with the report that covers the first full fiscal quarter that begins on or after October 1, 2023.

Based on this timetable, issuers with a December 31, 2023 fiscal year-end are required to begin complying with the rule amendments in their Form 10-K filing for fiscal year 2023 to disclose share repurchases and other reportable matters occurring during the quarter ending December 31, 2023.

- *Foreign private issuers:* Foreign private issuers that report using Form 20-F are required to comply with the new Form F-SR requirements starting with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024. Those issuers accordingly are required to file the first Form F-SR for the quarter ending June 30, 2024. The Form 20-F narrative disclosures that relate to the Form F-SR filings will initially be required in the first Form 20-F that is filed after the first Form F-SR has been filed.

Tagging of share repurchase disclosures

Companies are required to provide the share repurchase disclosure in a structured format using Inline XBRL. The presentation is required to include detail tagging of quantitative amounts within the required tabular disclosures and block text tagging and detail tagging of required narrative and other qualitative information. The initial compliance dates for the tagging requirements mirror those for the disclosure requirements.

Reporting by listed closed-end funds

In addition to share repurchases by corporate issuers, the rule amendments apply to share repurchases by registered closed-end management investment companies that are exchange-traded.

Listed closed-end funds are required to report daily share repurchase data and the related narrative disclosures in their annual and semi-annual reports on Form N-CSR. The funds are required to comply with the new disclosure and tagging requirements in their reports starting with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.

Planning considerations

The modernization of share repurchase disclosure has been a protracted process. It might be premature even at this date to consider the process completed. Business groups recently have filed lawsuits challenging the new reporting requirements on constitutional and administrative-law grounds.

Consistent with the approach the SEC has taken in other recent rule amendments, the buyback disclosure amendments require more detailed reporting and incorporate prescriptive requirements to promote uniform and comparable disclosures across the issuer community. Similar regulatory considerations have animated the share repurchase project and other rulemakings. The SEC's focus on suspected executive self-interest in some repurchase decisions echoes the agency's concerns about potential abuses that underpin the recent rule changes requiring disclosure of insiders' Rule 10b5-1 trading arrangements and the issuer's executive compensation determinations.

Issuers should consider whether they will have to augment their disclosure controls and procedures to collect, collate, and report daily share repurchase data in a timely manner. Issuers also should develop a clear rationale for the purposes, timing, and terms of their share repurchases, articulate any policies relating to trading by officers and directors during a repurchase program, and address the other qualitative disclosures required under the amended rules.

Considered together with the daily repurchase table, the narrative information will expose the operation of share repurchase policies and procedures, as well as related corporate governance controls, to heightened investor and regulatory scrutiny. The SEC intends for the disclosures to assist investors in assessing whether repurchase decisions are aligned with the maximization of shareholder value rather than motivated by earnings management considerations or other opportunistic behavior by the issuer's insiders. In view of the broad implications of the new disclosure requirements, preparation for compliance should involve a wide-angle review of all corporate policies and practices that relate to an issuer's repurchase plans and programs.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

Contributors



Alan L. Dye (co-editor)
Partner, Washington, D.C.
T +1 202 637 5737
alan.dye@hoganlovells.com



Richard Parrino (co-editor)
Partner, Washington, D.C.
T +1 202 637 5530
richard.parrino@hoganlovells.com



Kevin K. Greenslade
Partner, Northern Virginia
T +1 703 610 6189
kevin.greenslade@hoganlovells.com

Additional contacts

Steven J. Abrams
Partner, Philadelphia
T +1 267 675 4671
steve.abrams@hoganlovells.com

Richard Aftanas
Partner, New York
T +1 212 918 3267
richard.aftanas@hoganlovells.com

Tifarah Roberts Allen
Partner, Washington, D.C.
T +1 202 637 5427
tifarah.allen@hoganlovells.com

John B. Beckman
Partner, Washington, D.C.
T +1 202 637 5464
john.beckman@hoganlovells.com

Jessica A. Bisignano
Partner, Philadelphia
T +1 267 675 4643
jessica.bisignano@hoganlovells.com

David W. Bonser
Partner, Washington, D.C.
T +1 202 637 5868
david.bonser@hoganlovells.com

Glenn C. Campbell
Partner, Baltimore, Washington, D.C.
T +1 410 659 2709 (Baltimore)
T +1 202 637 5622 (Washington, D.C.)
glenn.campbell@hoganlovells.com

David Crandall
Partner, Denver
T +1 303 454 2449
david.crandall@hoganlovells.com

John P. Duke
Partner, Philadelphia, New York
T +1 267 675 4616 (Philadelphia)
T +1 212 918 5616 (New York)
john.duke@hoganlovells.com

Allen Hicks
Partner, Washington, D.C.
T +1 202 637 6420
allen.hicks@hoganlovells.com

Paul Hilton
Senior Counsel, Denver, New York
T +1 303 454 2414 (Denver)
T +1 212 918 3514 (New York)
paul.hilton@hoganlovells.com

Eve N. Howard
Partner, Washington, D.C.
T +1 202 637 5627
eve.howard@hoganlovells.com

William I. Intner
Partner, Baltimore
T +1 410 659 2778
william.intner@hoganlovells.com

Bob Juelke
Partner, Philadelphia
T +1 267 675 4615
bob.juelke@hoganlovells.com

Paul D. Manca
Partner, Washington, D.C.
T +1 202 637 5821
paul.manca@hoganlovells.com

Michael E. McTiernan
Partner, Washington, D.C.
T +1 202 637 5684
michael.mctiernan@hoganlovells.com

Stephen M. Nicolai
Partner, Philadelphia
T +1 267 675 4642
stephen.nicolai@hoganlovells.com

Brian C. O'Fahey
Partner, Washington, D.C.
T +1 202 637 6541
brian.ofahey@hoganlovells.com

Tiffany Posil
Partner, Washington, D.C.
T +1 202 637 3663
tiffany.posil@hoganlovells.com

Leslie (Les) B. Reese, III
Partner, Washington, D.C.
T +1 202 637 5542
leslie.reese@hoganlovells.com

Richard Schaberg
Partner, Washington, D.C., New York
T +1 202 637 5671 (Washington, D.C.)
T +1 212 918 3000 (New York)
richard.schaberg@hoganlovells.com

Michael J. Silver
Partner, New York, Baltimore
T +1 212 918 8235 (New York)
T +1 410 659 2741 (Baltimore)
michael.silver@hoganlovells.com

Andrew S. Zahn
Partner, Washington, D.C.
T +1 202 637 3658
andrew.zahn@hoganlovells.com

Elizabeth (Liz) L. Banks
Counsel, Washington, D.C.
T +1 202 637 2523
elizabeth.banks@hoganlovells.com

J. Nicholas Hoover
Counsel, Baltimore
T +1 410 659 2790
nick.hoover@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Berlin**
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta *
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Munich
New York
Northern Virginia
Paris
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.

*Our associated offices

**Legal Services Center

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2023. All rights reserved. 06881