

Appeals court sends share repurchase disclosure rule back to SEC

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At a glance

In May 2023 the SEC adopted rule amendments to require new and expanded disclosures relating to share repurchases. On October 31, an appeals court concluded that the SEC acted in violation of the Administrative Procedure Act and directed the SEC to correct defects in the rule within 30 days. Although the disclosure amendments remain in effect, it remains to be seen what changes to the rule could result from this decision.

What happened?

In May, the SEC adopted [amendments](#) that significantly expanded existing share repurchase disclosure requirements for domestic corporate issuers, foreign private issuers (FPIs), and listed closed-end funds. On October 31, an appeals court found that the SEC “failed to respond to petitioners’ comments and failed to conduct a proper cost-benefit analysis” in the final rule under the Administrative Procedure Act. In its [opinion](#), the court stopped short of vacating the rule but instead directed the SEC to remedy deficiencies in the rule within 30 days.

The final May amendments require reporting of daily repurchase activity, as well as increased reporting regarding the rationale and objectives for share repurchase plans. The rules also require tagging of share repurchase information using inline XBRL. The enhanced disclosures (e.g., daily rather than monthly activity) are intended to provide additional transparency into a reporting entity’s share repurchase activity and provide investors with additional information to assess the purposes and effects of share repurchases.

Reporting of daily repurchase activity

Tabular disclosure of quantitative daily share repurchase data will be required to be filed quarterly by domestic corporate issuers and foreign private issuers, and semiannually for listed closed-end funds. For each day the reporting entity (or another party acting on its behalf) purchases its own registered shares, it will be required to disclose the following:

- class of shares,
- number of shares purchased,
- average price paid per share,
- number of shares purchased under publicly announced plans,
- aggregate maximum number of shares or approximate dollar value that may still be purchased under a publicly announced plan,
- 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

- total number of shares purchased under a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), referred to as a “10b5-1 trading arrangement.”

Reporting entities will also be required to indicate whether certain officers and directors purchased or sold shares subject to a repurchase plan within four business days of the announcement of the plan.

Domestic corporate issuers and FPIs filing on domestic forms will report the tabular information in an exhibit to their quarterly and annual reports on Forms 10-Q and 10-K. FPIs filing on FPI forms will report the information on a new Form F-SR, which will be due 45 days following the end of each fiscal quarter. Listed closed-end funds will include the data in their annual and semi-annual reports on Form N-CSR.

Enhanced disclosures about share repurchase plans

Reporting entities will need to disclose additional information to allow investors to better understand the governance and strategies relating to share repurchase plans. Specifically, the disclosure will need to include the objectives or rationales for each plan and the process or criteria used to determine the amount of repurchases, and any policies and procedures relating to purchases and sales by officers and directors while a repurchase plan is ongoing.

10b5-1 trading arrangements

Entities reporting on Forms 10-Q and 10-K will be required to disclose material terms and trading arrangements adopted or terminated during the most recent quarter under a 10b5-1 trading arrangement. While there may be overlap between these disclosures and the tabular disclosure of daily repurchase activity, that may not always be the case. The tabular disclosure will be required only when there was repurchase activity, while these disclosures will be required whenever a 10b5-1 trading arrangement was adopted or terminated in the most recent quarter, which may not always correspond to actual share repurchases.

Structured data

The amendments require that the share repurchase disclosures be tagged using Inline XBRL.

What's next?

The SEC has 30 days to respond to the October 31 appeals court ruling. If the appeals court does not vacate the rule, then compliance dates based on the original May rule amendments depend on the type of entity, as follows.

- Domestic corporate issuers and FPIs filing on domestic forms will be required to comply beginning with the filing that covers the first full fiscal quarter that begins on or after October 1, 2023. For example, a calendar year-end entity with a fourth quarter beginning on October 1, 2023 would be required to comply beginning with its December 31, 2023 Form 10-K (covering activity in that fourth quarter), and in Form 10-Q filings thereafter.
- FPIs filing on FPI forms will be required to comply by filing a new quarterly Form F-SR related to the first full fiscal quarter that begins on or after April 1, 2024. Narrative disclosures related to filed Form F-SRs will be required in the following Form 20-F. For example, a calendar year-end FPI with a fiscal quarter beginning on April 1, 2024 will be required to file a Form F-SR for the quarter ended June 30, 2024 that will be due within 45 days of the fiscal quarter end. Narrative disclosures covering Form F-SRs filed during 2024 will be required beginning with the Form 20-F for the year-ended December 31, 2024.
- Listed closed-end funds will be required to comply starting with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.



To have a deeper discussion, contact:

Trent Horsfall	Martin Thiselton-Dyer	Kevin Vaughn
Director	Partner	Partner
Email: trent.r.horsfall@pwc.com	Email: martin.j.thiselton-dyer@pwc.com	Email: kevin.vaughn@pwc.com

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