

Publications

SEC Proposes Amendments to Rule 10b5-1 Trading Plans and Share Buyback Disclosure Rules

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On December 15, 2021, the Securities and Exchange Commission (the “Commission”) proposed amendments^[1] to the affirmative defense under Rule 10b5-1 and the Commission’s rules governing disclosure of share buybacks under Item 703 of Regulation S-K. The Commission also proposed new rules requiring disclosure of insider trading policies and practices and the creation of Form SR requiring accelerated disclosure relating to share buybacks. The proposed rules will be subject to a 45-day comment period following publication in the Federal Register.

Amendments to Rule 10b5-1, New Item 408 of Regulation S-K and amendments to Item 402 of Regulation S-K

In 2000, the Commission adopted Rule 10b5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”), to provide clarity around its established prohibition on insider trading and, specifically, determining whether a trade is made on the basis of material non-public information.

Rule 10b5-1 provides an affirmative defense to any trader, commonly including an issuer, affiliates of an issuer or “corporate insiders” (typically, an issuer’s directors and officers), against liability for insider trading where the trader’s purchase or sale is made pursuant to a Rule 10b5-1 plan (a binding contract to purchase or sell a security, an instruction to another person to purchase or sell a security for the instructing person’s account, or a written plan for trading securities) adopted when the trader was not yet aware of the material non-public information.

In response to longstanding concerns from the courts, commentators and legislators that the affirmative defense allows corporate insiders to manipulate the use of a Rule 10b5-1 plan and allows traders to opportunistically take advantage of the affirmative defense by trading on the basis of material non-public information, the Commission has proposed amendments to Rule 10b5-1, Item 408 of Regulation S-K and Item 402 of Regulation S-K.

The Commission's proposed rules, if adopted, will impose the following additional requirements for a trader to rely upon the affirmative defense under Rule 10b5-1(c):

- Rule 10b5-1 plans entered into *by an officer or a director* of an issuer must include a 120-day cooling off period before trading can commence under a plan after its adoption (including for modifications to a plan, such as cancelling one or more trades).
- Rule 10b5-1 plans entered into *by an issuer* must include a 30-day cooling off period before trading can commence under a plan after its adoption (including for modifications to a plan).
- The trader must not have purchased or sold securities under more than one single-trade plan within a 12-month period.
- Officers and directors must certify upon adoption or modification of a Rule 10b5-1 plan that they are not aware of material non-public information about the issuer or its securities, and that they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Exchange Act Section 10(b) and Exchange Act Rule 10b-5. Correlating with the statute of limitations for the Commission's ability to seek certain remedies for insider trading claims, the Commission's proposed instructions to the rule amendments would require officers and directors to retain the certification for 10 years.
- A Rule 10b5-1 plan must be *operated* in good faith, in addition to the current requirement that the plan be *entered into* in good faith and not as part of a plan or scheme to evade the prohibitions of or rule.

The affirmative defense would not apply to trades made pursuant to multiple overlapping Rule 10b5-1 plans that permit open market trading in the same class of securities. The Commission's amendment would not apply additional restrictions on overlapping plans to a corporate insider who acquires equity shares directly from an issuer, such as through an employee stock ownership plan or dividend reinvestment plan, where the transactions by the corporate insider are not executed on the open market.

In addition, the Commission's amended rules would impose new mandatory disclosure requirements relating to an issuer's insider trading policy and Rule 10b5-1 plans, including the terms of any such plans or arrangements entered into by the issuer's directors and officers. Under the current rules, issuers are not subject to required disclosure of insider trading plans or policies. If the Commission's rules are adopted as proposed, new Item 408 of Regulation S-K will require an issuer to disclose:

- in its Form 10-K whether the issuer has an insider trading policy and the policy and any related procedures,
- on a quarterly basis, in its Form 10-Q or Form 10-K, as applicable, any Rule 10b5-1 plans that were adopted or terminated by the issuer, including a description of the material terms of the plan, and
- in its Form 10-K, any Rule 10b5-1 plans entered into in the issuer's last fiscal quarter by the issuer's directors and officers and the material terms of any such plans.

In addition to new Item 408 of Regulation S-K, the Commission proposed to amend Item 402 of Regulation S-K to require narrative disclosure describing the issuer's policies and practices relating to grants of equity compensation awards in coordination with the release of material non-public information and tabular disclosure reporting option grants (including options and SARs) made to named executive officers within 14 days before or after the release of material non-public information and the market price

of the underlying securities on the trading day before and on the trading day after the release of such information. The proposed amendments indicate that the narrative disclosure may be included in the issuer's annual compensation discussion and analysis. Quantitative disclosure must be tagged using Inline eXtensible Business Reporting Language or "Inline XBRL".

The issuer's disclosure in Forms 10-K and 10-Q would be subject to the certifications made by the issuer's principal executive officer and principal financial officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002, which requires such officers to certify that the form does not contain untrue statements of material facts or omit to state material facts necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the periods covered by the reports.

In an effort to increase frequency of disclosure and transparency into the use of Rule 10b5-1 plans, the Commission's proposed rules create new requirements for insiders subject to the reporting requirements of Section 16 of the Exchange Act. Such insiders would be subject to a new check-the-box disclosure requirement indicating whether the transaction reported on a Form 4 or a Form 5 was made pursuant to Rule 10b5-1(c) or a trading plan that did not satisfy Rule 10b5-1(c). In addition, Section 16 insiders would have to report gifts of securities on Form 4 (due within two business days after the reported transaction) instead of on Form 5 (due on or before the 45th day after the end of the issuer's fiscal year).

Amendments to Share Buyback Disclosure Rules

One tool publicly traded issuers use to return capital to shareholders is to repurchase the issuer's equity securities (which we refer to as "equity shares") registered under Section 12 of the Exchange Act. Commonly referred to as a "share buyback", these repurchases are made by an issuer (or on its behalf) or by an affiliated purchaser and are subject to periodic disclosure requirements adopted by the Commission in 2003.

Seeking to enhance the frequency and depth of disclosure regarding share buybacks, the Commission's proposed rules, if adopted, will require an issuer to file a new Form SR (in tabular format) before the end of the first business day following the day the issuer executes a share repurchase order. Under the current framework, an issuer reports share repurchases in periodic reports on Forms 10-K, 10-Q, 20-F and N-CSR. The Commission has also proposed amendments to Item 703 of Regulation S-K (and the corresponding items on Form 20-F for foreign private issuers and Form N-CSR for registered closed-end funds), which would enhance the current disclosure requirements issuers must satisfy in periodic reports on Forms 10-K, 10-Q, 20-F and N-CSR with respect to repurchases of equity shares.

The Commission has proposed that issuers furnish (rather than file) the Form SR, such that the issuer would not be subject to liability under Section 18 of the Exchange Act for disclosures on Form SR. In addition, the information on Form SR would not be deemed incorporated by reference into filings under the Securities Act of 1933 (the "Securities Act") or subject to liability under Section 11 of the Securities Act, unless the issuer elects to expressly incorporate the Form SR by reference.

The Commission's proposed rules apply to an issuer (including foreign private issuers and registered closed-end funds) repurchasing equity shares registered under Section 12 of the Exchange Act. The tables below summarize the Commission's proposed and current disclosure requirements (which will remain in

effect along with any new requirements).

Rule, Amendment or Form Requirement

Proposed Disclosure

New Exchange Act Rule 13a-21 and Form SR

On a daily basis and due before the end of the first business day following the day the issuer executes a share repurchase (i.e., the trade date), which, in most cases, will require disclosure before a share repurchase has settled. An amended Form SR will be required if material changes occur after settlement.

New Exchange Act Rule 13a-21 and Form SR

Date of the repurchase

New Exchange Act Rule 13a-21 and Form SR

Identification of the class of equity shares

New Exchange Act Rule 13a-21 and Form SR

Identification of the total amount of equity shares purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs

New Exchange Act Rule 13a-21 and Form SR

The average price paid per equity share

New Exchange Act Rule 13a-21 and Form SR

The aggregate total amount of equity shares purchased on the open market

New Exchange Act Rule 13a-21 and Form SR

The aggregate total amount of equity shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18

New Exchange Act Rule 13a-21 and Form SR

The aggregate total amount of equity shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c)

Item 703 of Regulation S-K and Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

Disclose the objective or rationale for the share repurchase plan or program and the process or criteria used to determine the repurchase amounts



Item 703 of Regulation S-K and Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

Disclose any policies and procedures relating to purchases and sales of the issuer's equity shares by its officers and directors during a repurchase program, including any restriction on such transactions

Item 703 of Regulation S-K and Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

Disclose whether the issuer is making its repurchases pursuant to a plan that it intends to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and, if so, the date the Rule 10b5-1(c) plan was adopted or terminated

Item 703 of Regulation S-K and Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

Disclose whether the issuer is making its repurchases pursuant to the conditions of the Exchange Act Rule 10b-18 non-exclusive safe harbor

Item 703 of Regulation S-K and Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

Check-the-box disclosure indicating whether any of the issuer's officers or directors (collectively, "insiders") subject to the reporting requirements under Exchange Act Section 16(a) purchased or sold the issuer's equity shares subject to an issuer share repurchase plan or program within 10 business days before or after the announcement of such plan or program

Regulation S-T

Information disclosed pursuant to Item 703 of Regulation S-K and pursuant to Form SR will be required to be reported using Inline XBRL

Current Rule

Current Tabular Disclosure (Form 10-K, Form 10-Q, Form 20-F and Form N-CSR) Remaining in Effect

Item 703 of Regulation S-K

On quarterly basis on Form 10-K, Form 10-Q, Form 20-F or Form N-CSR

Item 703 of Regulation S-K

Identification of the class of equity shares purchased

Item 703 of Regulation S-K

Identification of the total amount of equity shares purchased on a monthly basis

Item 703 of Regulation S-K

The average price paid per equity share

Item 703 of Regulation S-K

The total number of equity shares purchased as part of a publicly announced repurchase plan or program

Item 703 of Regulation S-K

The maximum number (or approximate dollar value) of equity shares that may yet be purchased under publicly announced share repurchase plans or programs

Item 703 of Regulation S-K

Footnote disclosure of the principal terms of all publicly announced share repurchase plans or programs, the number of equity shares purchased other than through a publicly announced share repurchase plan or program, and the nature of such other form of transaction

Item 703 of Regulation S-K

Footnote disclosure of publicly announced share repurchase programs including the date each program was announced, the dollar (or equity share) amount approved, the expiration date (if any), of each program, that has expired in the applicable period, and each plan or program the issuer has determined to terminate prior to expiration or does not intend to make future repurchases

[1] The Commission's proposed rule releases are available at <https://www.sec.gov/rules/proposed/2022/33-11013.pdf> (Rule 10b5-1) and <https://www.sec.gov/rules/proposed/2021/34-93783.pdf> (Share Buyback Disclosure).