Hogan Lovells

SEC Update

December 28, 2021

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

SEC proposes major reform of share repurchase disclosure

On December 15 the SEC proposed new and amended rules that would require most reporting companies to provide more frequent and extensive disclosures about their share repurchase activity.

A company engaged in share repurchases would be obligated to report repurchase information on a new Form SR by the end of the first business day following each day on which it executed a repurchase. In addition, in its quarterly share repurchase disclosure, the company would be required to report additional information that would include the purpose or rationale for the repurchases, the criteria the company used to determine the repurchase amounts, and a description of any policies and procedures relating to purchases or sales of the company's securities by its directors or officers during the repurchase program.

The proposed amendments would apply to all registrants, including foreign private issuers and registered closed-end investment companies, with a class of equity security registered under Section 12 of the Exchange Act.

The SEC's proposing release (Release No. 34-93783), which can be accessed **here**, solicits comments on a wide range of issues relating to the proposal. The comment period will be open for 45 days after the release is published in the Federal Register.

Description of proposed rules

New daily reporting of share repurchases on Form SR

The SEC proposes to accelerate the disclosure of share repurchases by adding a daily reporting requirement to the current quarterly reporting scheme. The SEC also proposes to require the daily reporting to include detailed information about the company's repurchase activity.

Under a new Exchange Act Rule 13a-21, a company would be required to report on new Form SR any repurchase of shares or other units of registered equity securities made by or on its behalf before the end of the first business day following the day on which the company "executes" the share repurchase. The execution date would be the repurchase trade date rather than the settlement date. Accordingly, the obligation to file a Form SR would arise on the date on which the company and the counterparty agree to the repurchase terms and are obligated to settle the transaction. If a reported transaction is not settled, the company would be required to amend the report to disclose the failure to settle.

Form SR would require disclosure of the following information in a tabular format, by date, for each class or series of securities repurchased, which also would include repurchase activity by or on behalf of any affiliated purchaser:

- identification of the class or series of securities purchased;
- the total number of shares or units purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
- the average price paid per share or unit;
- the aggregate total number of shares or units purchased on the open market;
- the aggregate total number of shares or units purchased in reliance on the safe harbor from liability for manipulative conduct afforded by Exchange Act Rule 10b-18; and
- the aggregate total number of shares or units purchased pursuant to a trading plan adopted in reliance on Exchange Act Rule 10b5-1(c).

The SEC notes that it intends the proposed disclosure requirement to provide investors with "more detailed and timely disclosure" of repurchase activity for use to "monitor and evaluate issuer share repurchases, and their effects on the market for the issuer's securities." The SEC pointedly observes that, "when combined with existing executive compensation and financial statement disclosures," the information reported on Form SR "may improve the ability of investors to identify issuer repurchases potentially driven by managerial self-interest, such as seeking to increase the share price prior to an insider sale or to change the value of an option or other form of executive compensation."

Alluding to concerns over the burdens of daily share repurchase reporting on disclosure controls and procedures, the SEC proposes that companies would "furnish" rather than "file" Form SR. As a result:

- companies would not be subject to liability under Exchange Act Section 18 for disclosure in the form;
- information on Form SR would not be incorporated into Securities Act filings and subject to Securities Act liability unless expressly incorporated by a company; and
- late submission of a Form SR would not affect a company's eligibility to file a short-form registration statement on Form S-3 (or Form N-2, in the case of a registered closed-end investment company subject to the new filing requirement).

Expanded quarterly reporting of share repurchases in periodic reports

The SEC also proposes to amend Item 703 of Regulation S-K to expand the disclosures on quarterly share repurchase activity included in reports on Form 10-Q and Form 10-K. Sounding a theme that pervades its release, the SEC expresses the expectation that the additional disclosures, considered together with the daily reporting on Form SR, "would help investors to assess whether the issuer or its insiders are potentially engaged in self-interested or otherwise inefficient repurchases and thereby help mitigate some of the potential harms associated with share repurchases."

The proposed amendments would add to Item 703 a requirement to disclose the following new information:

- the objective or rationale for the company's 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 company's securities by its officers and directors during the repurchase program, including any restrictions on such programs;
- whether the company made its repurchases pursuant to a trading plan adopted in reliance on Rule 10b5-1(c), and, if so, the date on which the plan was adopted or terminated; and
- whether the repurchases were made in reliance on Exchange Act Rule 10b-18.

The proposal also would require the company to report – by checking a box in its Item 703 disclosure – if any of its officers or directors subject to the reporting requirements of Exchange Act Section 16(a) purchased or sold shares or other units subject to the company's repurchase plan or program within ten business days before or after the company announced the plan or program. The SEC intends these disclosures to inform investors whether the company "has taken steps to prevent officers and directors from potentially benefiting from issuer repurchases in a manner that is not available to regular investors."

The SEC proposes corresponding amendments to share repurchase disclosures required by Form 20-F for foreign private issuers and Form N-CSR for registered closed-end investment companies.

Tagging of share repurchase disclosures

Under the new reporting scheme, companies would be required to provide in Inline XBRL (a) detail tagging of quantitative amounts within the tabular disclosures included on Form SR and reported pursuant to Item 703 and (b) block text tagging and detail tagging of narrative and quantitative information disclosed in the footnotes to the Item 703 table. The tagging requirements also would apply to the same disclosures in Item 16E of Form 20-F and Item 9 of Form N-CSR.

Looking ahead

The SEC issued its proposal to "modernize" share repurchase disclosure, which was adopted over the dissenting votes of two Commissioners, as part of a similarly sweeping set of rule amendments published on the same day that address Rule 10b5-1 plans and the regulation of credit default swaps and other swap-based security products. In support of its far-reaching proposals, the SEC recites a catalogue of purported abuses by some companies and insiders that the Commission believes have harmed investors and impaired the efficient functioning of markets.

The proposed new share repurchase disclosure requirements contain the elements of faster and more targeted reporting that characterize many of the SEC's disclosure reform initiatives. Requiring daily reporting of share repurchases would, in some respects, align the SEC reporting regime with that of some foreign jurisdictions. The SEC points out, for example, that the UK's Financial Conduct Authority and the Australian Securities Exchange require certain issuers to disclose share repurchases on the next business day.

As in any rulemaking, the final rules could differ in important respects from those proposed. The SEC has solicited comments on a range of alternative approaches to enhancing disclosure on share repurchases. It has not, however, given commenters much time to respond to the rule proposal. Share repurchase disclosure, like other measures proposed by the SEC in recent weeks, is an area of focus for SEC Chair Gensler. This proposal's abbreviated 45-day comment period suggests that the SEC may move quickly to adopt the new reporting requirements.

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.

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