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PERSPECTIVE

DR. T ON SECURITIES

SEC mandates tighter share repurchase disclosure

By Sara L. Terheggen

Public companies have long implemented share repurchase programs for a variety of reasons, including an alternative way of returning capital to shareholders that is more tax advantageous (other than dividends), repositioning the value proposition to the market, offsetting dilution from other corporate activities such as mergers and acquisitions and employee stock option exercises and increasing earnings per share or improving other corporate metrics by reducing shares outstanding. According to the SEC, corporate buybacks amounted to nearly \$950 billion in 2021 and exceeded \$1.25 trillion in 2022. There have been no signs of corporate buybacks stopping in 2023; rather, the implementation of a share repurchase program has been a staple disclosure in earnings releases this year.

Despite their prevalence, share buyback programs have not been without their critics. These criticisms include manipulating per-share earnings to meet or exceed analyst estimates, using extra corporate cash on hand to the detriment of long-term strategy, reducing amounts available to allocate to employees and benefiting company insiders who can sell their shares at higher prices once the stock has appreciated following an announcement of a share repurchase program. Until this month, public companies have been sub-

ject to an existing public disclosure regime through Item 703 of Regulation S-K, which largely required monthly disclosure of repurchases to be disclosed in a Company's Forms 10-Q and 10-K, Form 20-F for foreign private issuers and Form N-CSR for closed-end

must be included on an exhibit to a company's Form 10-Q or 10-K, with foreign private issuers being required to report quarterly on a new Form F-SR and listed closed end funds being required to report such disclosures in their semiannual and annual reports on Form

officers and directors for domestic issuers and directors and members of senior management who would be identified under Item 1 of Form 20-F purchased or sold such shares within four business days before or after the announcement of a repurchase plan or program.

Narrative Disclosure - Existing narrative disclosures require companies to disclose the date of announcement of a repurchase program, the dollar or share amount approved, the expiration date of the program, any program that has expired and any program that a company has determined to terminate prior to expiration. Under the new rules, companies must now also provide the objectives or rationale for each repurchase pro-

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funds. On May 3, the SEC adopted new rules mandating significant disclosure relating to stock buybacks to improve disclosures and provide investors with enhanced information to assess the purposes and effects of share repurchases. The new rules also depart from the SEC's practice of deferring to home country rules for foreign private issuers and make no accommodations to the disclosure obligations for smaller reporting companies

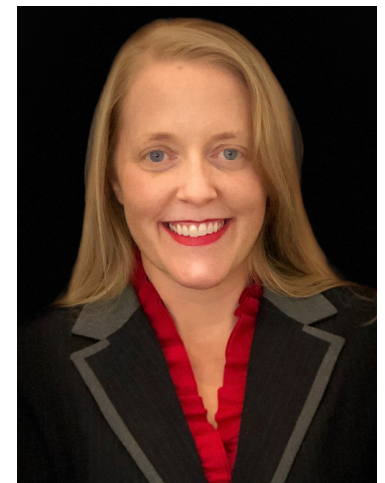
New Rules

Activity Disclosure - Instead of monthly disclosure, all issuers will now be required to provide disclosure on a quarterly basis of its daily repurchases. The disclosure

N-CSR. The exhibit must report date of repurchase, class of shares repurchased, average price paid per share, total number of shares purchased, the maximum number of shares available to purchase under an announced plan, number of shares that were repurchased in the open market, number of shares purchased in transactions intended to qualify for Rule 10b-18 safe harbor and total number of shares purchased pursuant to a plan that satisfies Rule 10b5-1(c), including a footnote disclosing the date of adoption or termination of the Rule 10b5-1(c) plan.

Insider Sales - Companies will now be required to include a checkbox along with their tabular disclosure indicating whether Section 16

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gram, the process or criteria used to determine the amount of repurchases, the number of shares purchased other than through the publicly announced program and nature of such repurchases, and any policies and procedures relating to the purchase and sale of the company's securities during a repurchase program by its officers and directors - including any transaction restrictions.

10b5-1 Plans - The new rules also require that issuers disclose whether a 10b5-1 plan was adopted or terminated in the prior fiscal quarter. In addition, issuers must describe the material terms of any such plan, including date on which the plan was adopted or terminated, the duration of the plan and the aggregate number of shares to be purchased or sold pursuant to the plan.

Compliance Dates & Compliance

Domestic issuers are required to comply with the new disclosure obligations beginning with the first filing that covers the first full fiscal quarter that begins on or after Oct. 1, 2023. Foreign private issuers will have until the first full fiscal quarter that begins on or after April 1, 2024. Finally, closed-end funds will be required to comply for the first six-month period that begins on or after Jan. 1, 2024.

While the new rules certainly did not go as far as originally proposed, the enhanced disclosure obligations still resulted in an added burden for companies in providing adequate share repurchase disclosure. Companies should use the available transition period to establish their disclosures, benchmark against peers and be nimble enough to revise disclosure as necessary to align with market expectations.