SEC PROPOSES TO ENHANCE DISCLOSURES OF STOCK BUYBACKS AND OF TRADES BY INSIDERS, AND TO NARROW AFFIRMATIVE DEFENSE FOR INSIDER TRADING

In a release published December 15, the SEC has proposed amendments to its rules governing disclosure of issuer share repurchasers (also known as stock buybacks). The proposed amended rules would require more detailed and more frequent disclosures about share repurchases and would require presentation using structured data language (Inline XBRL). The last time the SEC imposed disclosure requirements for share repurchases was in 2003, when it adopted Item 703 of Regulation S-K. Chairman Gensler noted that the proposals are intended to "lessen the information asymmetries between issuers and investors through enhanced timeliness and granularity of disclosures."

In a separate release published on the same day, the SEC has proposed amendments to Rule 10b5-1 that would add new conditions, create new disclosure requirements and update Section 16 forms to identify Rule 10b5-1 trading arrangements. Rule 10b5-1 was promulgated 20 years ago and provides insiders with an affirmative defense to insider trading liability in circumstances where, subject to conditions, trades were made pursuant to a binding contract, instruction or written plan adopted when the insider was not aware of material non-public information. The proposals are billed as strengthening the requirements to access the affirmative defense to insider trading and improve transparency around insider transactions in company securities.

Unless otherwise noted, all section references are to the Securities Exchange Act of 1934.

Share Buybacks

The proposed amended rules would require issuers, including foreign private issuers, to report any purchases made by or on behalf of the issuer or affiliated purchasers (as defined in Rule 10b-18(a)(3)) of shares or other units of equity securities of the issuer registered under Section 12. New Form SR would be required to be filed with the SEC before the end of the first business day following the day on which the share repurchase is executed. In addition to information about the shares/units repurchased (on a daily basis), disclosure would also be required of the total number of shares/units purchased in reliance on the Rule 10b-18 safe harbor and the total number of shares/units purchased pursuant to a Rule 10b5-1 plan.

The proposed rules would also require, by reason of amendments to Rule 703 (and corresponding amendments to Form 20-F), disclosure of:

- the objective or rationale for an issuer's share repurchases and process or criteria used to determine the amount of repurchases;
- 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 restriction on such transactions;
- whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and if so, the date that the plan was adopted or terminated; and

- whether repurchases were made in reliance on the Rule 10b-18 nonexclusive safe harbor.

Forms setting forth Rule 703 disclosure would include a box to be checked if any Section 16 officer or director purchased or sold shares/units subject to repurchase within 10 business days before or after announcement of the repurchase program.

The SEC recognizes that its proposed rules could require disclosure prior to settlement of reported trades, and notes that the requirement to file an amended Form SR to correct material errors or changes to prior disclosures should address concerns. Form SR would be deemed furnished not filed, meaning that Section 18 liability would not attach and the information would not automatically be incorporated by reference into filings made under the Securities Act of 1933 for purposes of liability under Section 11 of the 1933 Act.

Rule 10b5-1 Amendments

The SEC has proposed new conditions for the affirmative defense under Rule 10b5-1(c)(1):

- 10b5-1 trading arrangements entered into *by corporate officers or directors* must include a 120-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement;
- 10b5-1 trading arrangements entered into *by issuers* must include a 30-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement;
- officers and directors must personally certify that they are not aware of material non-public information about the issuer or the security when adopting a new or modified trading arrangement;
- the affirmative defense under Rule 10b5-1(c)(1) does not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities;
- 10b5-1 trading arrangements to execute a single trade (so-called "single-trade plans") are limited to one plan per 12-month period; and
- 10b5-1 trading arrangements must be entered into and operated in good faith.

The SEC has proposed the following new disclosure requirements:

- for domestic and foreign private issuers to disclose, in annual reports (Form 10-K, proxy and information statements on Schedules 14A or 14C, or Form 20-F), whether or not (and if not, why not) the issuer has adopted insider trading policies and procedures. Additionally, issuers would be required to disclose their insider trading policies and procedures, if they have adopted such policies and procedures (these would be covered by the Section 302 certifications and be tagged using Inline XBRL) (Item 408(b); Item 16J);

- for domestic issuers to disclose, annually (and tagged using Inline XBRL), the issuer's option grant policies and practices, and provide tabular disclosure showing equity compensation grants made 14 calendar days before or after the release of material non-public information in a periodic report and the market price of the underlying securities on the trading day before and after the release of such information (Item 402(x));
- for domestic issuers to disclose, in quarterly and (to cover the fourth quarter) annual reports (and tagged using Inline XBRL), the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers and issuers, and the terms of such trading arrangements (Item 408(a)).

Section 16 officers and directors would be required to disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement. Section 16 insiders would also be required to disclose promptly bona fide gifts of securities on Form 4.

Mark S. Bergman
Washington, D.C.
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