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SEC Amendments to Share Repurchase Disclosure Rules Impact BDCs and Exchange-Traded Registered Closed-End Funds

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On May 3, 2023, the Securities and Exchange Commission ("SEC") adopted amendments to its existing rules regarding disclosures about purchases of an issuer's equity securities by or on behalf of the issuer or an affiliated purchaser, commonly referred to as "buybacks". The amended rules impact business development companies ("BDCs") and certain registered closed-end management investment companies that are exchange-traded ("Listed Closed-End Funds"), among other issuers. According to the SEC, the amendments are intended to provide investors with enhanced information to assess the purposes and effects of repurchases, including whether those repurchases may have been taken for reasons that may not increase an issuer's value.

The revised disclosure rules specifically affect:

- Issuers that have a class of equity registered under the Securities Exchange Act of 1934 (the "Exchange Act") and file on domestic forms, including BDCs;
- Listed Closed-End Funds; and
- Foreign private issuers ("FPIs").

We note that with the exception of BDCs and Listed Closed-End Funds, other investment companies subject to regulation under the Investment Company Act of 1940 (the "1940 Act") — including non-traded registered closed-end funds and registered open-end funds, such as mutual funds and exchange-traded funds, or "ETFs" — fall outside the scope of the amended rules, as they are not required to provide repurchase disclosure under Item 703 of Regulation S-K as implemented in Form N-CSR.

Disclosure of Daily Share Repurchase Activity

The final amendments eliminate the current requirements in Regulation S-K, Form 20-F and Form N-CSR to disclose monthly repurchase data in an issuer's periodic reports.

Instead, under the amendments, subject issuers — including BDCs and Listed Closed-End Funds — must include tabular disclosure of their share repurchase activity aggregated on a daily basis, and disclosed either quarterly or semi-annually. The table must include, for each date on which a share repurchase is executed:

- The class of shares;
- Total number of shares purchased, including all issuer repurchases, regardless of whether made pursuant to a publicly announced repurchase program;
- Average price paid per share;
- Total number of shares purchased as part of a publicly announced program;
- Aggregate maximum number of shares (or approximate dollar value) that may yet be purchased under the publicly announced program;
- Total number of shares purchased on the open market, which includes all shares repurchased by the issuer in open market transactions (excluding tender offers and exercised put options);
- Total number of purchased shares intended to qualify for the Rule 10b-18 safe harbor; and
- Total number of shares purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) (a "Rule 10b5-1 plan").

In a footnote to the table, issuers must disclose the date that any Rule 10b5-1 plan was adopted or terminated. Notably, in the case of a non-traded BDC structured as a tender offer or interval fund, the foregoing tabular disclosure would be required with respect to shares purchased pursuant to periodic repurchase offers, while similar disclosure would not be required in the case of non-traded registered closed-end funds.

Issuers must also include a checkbox preceding the tabular disclosures to indicate whether certain officers and directors purchased or sold shares that are the subject of a share repurchase program within four business days before or after the announcement of the program. For BDCs and domestic corporate issuers, along with Listed Closed-End Funds, this checkbox requirement applies to any officer or director subject to reporting requirements under Section 16(a) of the Securities Exchange Act of 1934, as amended.

The daily share repurchase data must be disclosed either quarterly or semi-annually, depending on the type of issuer:

- BDCs must file the repurchase data every quarter in an exhibit to their Form 10-Q and Form 10-K (for an issuer's fourth fiscal quarter), in the same manner as domestic corporate issuers;
- Listed Closed-End Funds must disclose the data in their annual and semi-annual reports on Form N-CSR; and
- FPIs reporting on the FPI forms must disclose the data at the end of every quarter in a new Form F-SR, which must be filed within 45 days after the end of an FPI's fiscal quarter.

Enhanced Narrative Disclosure Requirements

The amendments modify and expand the requirements for narrative disclosures of share repurchases in Item 703 of Regulation S-K, Form 20-F and Form N-CSR.

Under the amendments, subject issuers such as BDCs and Listed Closed-End Funds will be required to make narrative disclosures on the applicable forms regarding:

- The objectives or rationales for the issuer's share repurchases and the process or criteria used to determine the amount of repurchases; and
- Any policies and procedures relating to purchases and sales of the issuer's securities during a repurchase program by its officers and directors, including any restriction on such transactions.

Disclosure Regarding Rule 10b5-1 Trading Arrangements

The amendments introduce new Item 408(d) to Regulation S-K, which will require a subject issuer, including a BDC or Listed Closed-End Fund, to disclose whether, during its most recently completed fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), the issuer adopted or terminated a Rule 10b5-1 plan. Issuers must also provide a description of the material terms of the plan, other than pricing terms, including:

- The date on which the 10b5-1 plan was adopted or terminated;
- The duration of the 10b5-1 plan; and
- The aggregate number of securities to be purchased or sold pursuant to the 10b5-1 plan.

Compliance Dates

The SEC provided transition periods to delay compliance dates depending on the type of issuer:

- Listed Closed-End Funds must comply with the amendments beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024.
- FPIs that file on FPI forms must comply with the amendments in the new Form F-SR beginning with the Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024. Narrative disclosure that relates to the Form F-SR filings will be required in the subsequent Form 20-F.
- All other issuers, including BDCs, must comply with the amendments on Forms 10-Q and 10-K (for their fourth fiscal quarter) beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023.

Notably, a number of industry groups, including the U.S. Chamber of Commerce, have sued the SEC to block implementation of the newly adopted amendments. As a result, the timing of specific compliance dates may change as a result of such ongoing litigation.

Key Takeaways

- Exchange-traded BDCs and Listed Closed-End Funds should consider adopting policies and procedures relating to share repurchase plans or programs if they do not already have them in place, and review existing policies and procedures for any required revisions to reflect the recently adopted amendments.
- All BDCs and Listed Closed-End Fund should review and enhance internal procedures to track share repurchase activity — whether through open-market share buy-back programs or through periodic repurchase offers — including trades made by directors and Section 16 officers within four days of announcements of such share repurchase programs.
- Fund boards should take the final amendments into account when contemplating and approving share repurchase programs, including setting the terms of periodic repurchase offers in the context of non-traded BDCs. In particular, fund boards should consider documenting in minutes and/or resolutions the objectives or rationales for share repurchases, the expected impact of the repurchases on the company and shareholders, and the process or criteria used to determine the number and timing of share repurchases.
- BDCs and Listed Closed-End Funds should also consider the impact of the enhanced disclosure in the context of adopting, changing or terminating Rule 10b5-1 plans, including those often used by issuers to implement open market share repurchase

programs.