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Get Ready to Comply Next Quarter With the SEC's Amended Rules for Corporate Equity Buy-Backs

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Corporate buy-back plans will be impacted this year both by the adoption of new rules directly addressing such plans, and new rules related to advance stock trading plans that permit trading to continue even when in possession of material, non-public information. Many corporate buy-back plans currently are designed to comply with the safe harbor for such advance trading plans, Rule 10b5-1, so that the company's repurchases are not restricted to open trading windows.

This client alert outlines the changes that companies should begin to prepare for as the deadlines for compliance approach. Although a major trade association has filed a lawsuit challenging the new rules, the court will not likely stay the new rules prior to their effectiveness.

New SEC Buy-Back Rules

The new buy-back rules adopted by the SEC will become effective for any report filed on or after October 1, 2023. Calendar year companies must begin to comply for their annual reports on Form 10-K (or 20-F for foreign private issuers) filed in 2024 and covering buy-back activity in the fourth quarter of 2023. Quarterly, companies will be required to file an exhibit including tabular disclosure of daily quantitative share repurchase information, including the average price and number of shares repurchased each day, as well as disclosure of repurchases made pursuant to Rule 10b5-1 and 10b-18 (the limited safe harbor from market manipulation concerns). Foreign private issuers will provide the disclosure in their annual reports on Form 20-F and on new Form F-SR. New narrative disclosure will also describe the company's rationales and objectives for engaging in the buy-back program, as well as any policies or restrictions it places on trading by officers and directors during the period in which the company is repurchasing shares.

New Rules for Advance Trading Plans

The SEC had originally proposed, but did not ultimately adopt, new cooling off period and other requirements that would have applied to the company under amendments to Rule 10b5-1. However, in adopting the new buy-back rules, it added new Item 408(d) of Regulation S-K that will require quarterly disclosure in periodic reports on Forms 10-Q and 10-K about a domestic issuer's adoption and termination of Rule 10b5-1 trading arrangement. Form 20-F will require a foreign private issuer to disclose information about publicly- announced trading plans and terminations of such plans.

What Issuers Should Do Now

We recommend that issuers consider their planned or ongoing stock buy-back programs with a view to the new required disclosures that will cover periods at the end of the current fiscal year. Some issuers may consider modifying their current trading plans, but others merely should ensure that their current disclosure procedures and practices are updated to satisfy the new requirements. For example:

- given the requirement to disclose the objectives of buy-back plans, it may be prudent to ensure that relevant minutes or resolutions of the Board of Directors address that subject;
- given the requirement to disclose policies and procedures related to transactions by officers and directors, should the company's employee stock trading policies be re-considered?

In sum, companies should expect the rules to become effective on schedule, and begin to consider the impact of the new disclosure requirements well before the beginning of their last fiscal quarters.

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