Cahill

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SEC Proposes Amendments to Share Repurchase Disclosure Rules

In December 2021, the Securities and Exchange Commission (the "SEC") proposed amendments to its rules regarding disclosure of repurchases of an issuer's equity securities, commonly referred to as buybacks. Pursuant to Item 703 of Regulation S-K, issuers currently are required to disclose in their periodic reports on a quarterly basis (or for foreign private issuers, on an annual basis) (i) information as to any share repurchases by the issuer or any affiliated purchaser during such quarter, and (ii) the principal terms of all publicly-announced repurchase programs. However, issuers are not required to disclose the dates or other details of executed trades pursuant to a publicly-announced repurchase program. As a result, investors and others often are unaware of an issuer's buyback activity until it is reported in periodic reports, typically long after the trades themselves have been executed. The proposals aim to address this information asymmetry.

I. New Form SR

The proposed amendments would require an issuer (including foreign private issuers) to provide disclosure on a new Form SR for each day that it, or an affiliated purchaser, makes a repurchase. The Form SR would be required to be furnished not later than one business day after execution of an issuer's share repurchase order (which would precede the current standard t+2 final settlement date) and would require the following disclosure in tabular form, by date:

- identification of the class of securities purchased;
- the total number of shares purchased, whether or not made pursuant to a publicly announced program;
- the average price paid per share;
- the aggregate total number of shares purchased on the open market;
- the aggregate total number of shares purchased in reliance on the safe harbor of Rule 10b-18 under the Securities Exchange Act of 1934 (the "Exchange Act"); and
- the aggregate total number of shares purchased pursuant to a plan intended to meet the requirements of Rule 10b5-1(c) under the Exchange Act (a "Rule 10b5-1 plan").

As proposed, the Form SR would be required to be furnished, as opposed to filed, and therefore would not subject the issuer to liability under Section 18 of the Exchange Act or Section 11 of the Securities Act of 1933.

II. Enhanced Periodic Disclosures

The proposed amendments also would enhance the existing periodic disclosure requirements by requiring an issuer to disclose:

- the objective or rationale for the share repurchases and the process or criteria used to determine the repurchase amounts;
- 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 the issuer is making its repurchases in reliance on the safe harbor of Rule 10b-18 or pursuant to a Rule 10b5-1 plan; and
- whether the issuer's officers and directors sold shares within 10 business days before or after the announcement of a repurchase plan or program by using a checkbox on the Form SR.

Under the proposed amendments, the information disclosed pursuant to both Form SR and Item 703 would be required to be reported using Inline eXtensible Business Reporting Language or "Inline XBRL".

III. Conclusion

If adopted, the proposed amendments will significantly alter the current disclosure regime by increasing both the level of detail and the frequency with which companies are required to disclose information relating to stock repurchase programs. If implemented, the proposed rules likely will result in additional compliance costs for issuers seeking to implement repurchase programs in the future, particularly those arising from furnishing a Form SR in a timely manner. It is also possible that the new Form SR filing requirement could provide a roadmap of companies' share repurchase strategies. Companies may want to reconsider those strategies in light of the new rules. The proposed amendments were published in the *Federal Register* on February 15, and the comment period is due to expire on April 1, 2022.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Kimberly C. Petillo-Décossard (partner) at 212.701.3265 or kpetillo-decossard@cahill.com; Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or Alexandra L. McIntire (associate) at 212.701.3575 or amcintire@cahill.com; or email publications@cahill.com.