Cooley

Public Companies Update - April One-Minute Reads

April 26, 2023

SEC adopts final rules regarding share repurchase disclosures

On May 3, 2023, the **Securities and Exchange Commission adopted final rules** to require enhanced disclosure about issuer share repurchases under the Exchange Act. The final rules will require quarterly tabular disclosure of an issuer's daily repurchase activity, instead of disclosure one business day after execution of a share repurchase, as was initially contemplated in the proposed rules. This tabular disclosure must contain specified information about the repurchases broken out by day and will be provided in an exhibit to Forms 10-Q and 10-K for issuers filing on domestic forms, or in new Form F-SR for issuers filing on foreign private issuer (FPI) forms.

The final rules also:

- Require an issuer to disclose quarterly via a checkbox whether any of its Section 16 officers or directors – or senior management or directors for FPIs – purchased or sold shares that are the subject of an issuer share repurchase plan or program within four business days before or after the announcement of the plan or program, or announcement of an increase to an existing plan or program.
- Revise Item 703 to eliminate the current requirement in Item 703 of Regulation S-K to disclose monthly repurchase data **and** require an issuer to disclose in its Forms 10-Q and 10-K:
    - The objectives or rationales for its share repurchases and the 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 restrictions on those transactions.

      Note: Corresponding narrative disclosure requirements also will be added to Item 16E of Form 20-F.
- Add new Item 408(d) to Regulation S-K to require quarterly disclosure in Forms 10-Q and 10-K of an issuer's adoption, material modification or termination of Rule 10b5-1 trading arrangements, as well as a description of the material terms of the trading arrangements.

Issuers filing on domestic forms will be required to comply with the amendments to Forms 10-Q and 10-K beginning with the first filing covering the full fiscal quarter beginning on or after October 1, 2023. This means that the first report requiring compliance for calendar year-end companies will be the **2023 Form 10-K filed in 2024**, as it relates to repurchases made during the quarter ending December 31, 2023.

FPIs filing on FPI forms will be required to comply with the amendments in new Form F-SR beginning with the first filing covering the full fiscal quarter that begins on or after April 1, 2024. This means that the first Form F-SR requiring compliance for calendar year-end companies will need to be filed beginning with the quarter ended June 30, 2024. The amendments to the Form 20-F narrative disclosure will be required starting in the first Form 20-F filed after the FPI's first Form F-SR has been filed.

For more information, refer to **our recent client alert**, **the SEC Fact Sheet** and **this Cooley PubCo blog post**.

Survey highlights board cybersecurity oversight

In March, The Wall Street Journal and the National Association of Corporate Directors published their findings from a survey of 472 public and private company directors regarding various aspects of board cybersecurity oversight. Key highlights from the survey include:

- Only 30% of directors rated their boards' ability to oversee a cyber crisis as "advanced" or "expert," despite more than three-quarters (76%) of boards having at least one cyber expert.
- Among companies with no cyber experts on their board, 67% of directors said they planned to educate existing board members with cybersecurity certificates or credentials and/or develop knowledge among all members of the board.
- 22% of public companies responded that they lack cyber expertise; of those, 31% plan to hire an independent director with cyber expertise.
- Cyber-specialist board directors increased overall board awareness of cyber risk in 62% of companies surveyed, but they were sometimes unable to contribute more widely to board discussions.
- 90% of larger businesses that have a chief information security officer or chief information officer deliver their cyber risk briefing agreed that the information allows them to effectively oversee cyber risk, showing a strong correlation between the role of the executive delivering the cyber risk briefing and the board's ability to effectively oversee cyber risk.
- Less than half of all respondents (48% for public and private companies) said their board had taken part in a tabletop exercise related to cyber-attacks.

For more information, refer to **part one** and **part two** of the survey results.

US Supreme Court hears oral argument in Slack direct listing case

On April 17, **the Supreme Court heard oral arguments** in *Slack Technologies v. Pirani*, presenting the question of whether shareholders in a direct listing have standing to sue under Sections 11 and 12 of the Securities Act. Previously, the US Court of Appeals for the Ninth Circuit affirmed the district court's ruling that the plaintiff did have standing to sue under Sections 11 and 12, even if they could not definitively trace the securities that they acquired to the registration statement. Slack appealed the decision, contending that tracing to the registration statement is required under Section 11. **As this Cooley PubCo blog post discusses in further detail**, the oral arguments possibly signaled a potential resolution to the case, with the justices differentiating between Sections 11 and 12.

SEC announces charges for Regulation A violations

On May 16, **the SEC announced charges against 10 microcap companies** for offering and selling securities in violation of Regulation A, which provides a limited exemption from registration under the Securities Act for smaller offerings, subject to certain conditions. According to the press release, each of the companies obtained qualification from the SEC for their securities offerings under Regulation A but later made significant changes to their offerings that did not meet the requirements of the exemption. The changes included improperly increasing the number of shares offered, improperly increasing or decreasing the price of shares offered, failing to file updated financial statements for ongoing offerings, and engaging in prohibited at the market or delayed offerings, which resulted in the companies offering and selling unregistered securities, according to the SEC. All 10 companies agreed to settle the charges, which serves as an important reminder to companies conducting a Regulation A offering to ensure that any fundamental changes after the offering statement has been qualified by the SEC still satisfy the exemption conditions.

Delaware state bar proposes amendments to DGCL

The Delaware State Bar Association recently recommended legislation proposing to amend the Delaware General Corporation Law (DGCL), which is expected to be considered by the Delaware General Assembly during its 2023 regular session. Most notably for public companies, the amendments would revise Section 242 of the DGCL to:

- Eliminate the need for a default vote of stockholders for charter amendments effecting specific types of forward stock splits and associated increases in the authorized number of shares.
- Reduce the minimum stockholder vote required to authorize a charter amendment that increases or decreases the authorized shares of a class or effects a reverse split of the shares of a class, where the shares are listed on a national securities exchange immediately before the amendment becomes effective and meet the listing requirements of the exchange after the amendment becomes effective.

These proposed amendments would be particularly helpful for companies with large retail shareholder bases, as they would lower the required vote threshold for the specified amendments – from the current threshold of at least a majority in voting power of the outstanding stock entitled to vote – to one based on votes cast, provided the specified conditions are met. In addition, the proposed amendments would, among other things:

- Confirm that a corporation is not required to receive the statutory minimum consideration (typically the par value) for a disposition of treasury shares.
- Simplify the requirements for the filing of certificates of validation in connection with the ratification of certain defective corporate acts.
- Provide greater certainty regarding the stockholders who must be given a notice of a non-unanimous action by consent of stockholders.
- Reduce the vote required to consummate a domestication, transfer or continuance of a Delaware corporation to a non-US entity.
- Revise the provisions governing statutory appraisal rights, including to add such rights in connection with a transfer, continuance or domestication of a Delaware corporation to a non-US entity.
- Provide that no vote of stockholders is required to authorize a sale, lease, or exchange of collateral securing a mortgage or pledge under specified circumstances.

If enacted, the amendments would become effective on August 1, 2023, subject to certain specified exceptions. Refer to **this publication from Richards, Layton & Finger** for more information on the proposed amendments.