

suggested that the identity of the broker-dealer could be disclosed solely to the Commission, rather than to the public.¹⁰⁰

After consideration of the above comments, and the concerns expressed about disclosure of the broker-dealer's identity, and in view of the fact that most of the commenters agreed that publicly available information about issuer repurchasing activity would be useful for investors, we are adopting the proposed tabular disclosure requirements, with one modification. Specifically, the final rules will not require issuers to disclose the identity of the broker-dealer(s) used to effect the purchases.¹⁰¹

As adopted, Regulations S-K and S-B, and Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F, and N-CSR are amended to require periodic disclosure of all issuer repurchases of shares or other units of any class of the issuer's "equity securities"¹⁰² that are registered by the issuer pursuant to Section 12 of the Exchange Act.¹⁰³ In particular, an issuer is required to disclose information concerning its repurchases in a new table in Forms 10-Q/10-QSB (new Item 2(e)), 10-K/10-KSB (new Item 5(c)), 20-F, and, for registered closed-end funds, Form N-CSR (new Item 8).¹⁰⁴ The table in Forms 10-K/10-KSB, 10-Q/10-QSB, and N-CSR includes disclosure of all issuer repurchases of its Section 12 registered equity securities (both open market and private transactions) for its last fiscal quarter (the fourth quarter, in the case of Forms 10-K/10-KSB), or in the case of closed-end funds, semi-annual period, including the total number of shares (or units) purchased (reported on a monthly basis), the average price paid per share, the total number of shares (or units) purchased as

part of a publicly announced repurchase plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs.¹⁰⁵ As stated above, the disclosure requirement is independent of the Rule 10b-18 safe harbor.

New Item 16E to Form 20-F requires the same tabular presentation of information (again, pursuant to the adopted amendments, the identity of the broker-dealer effecting the transactions will not be required in the table included in Form 20-F). However, a foreign private issuer that has securities registered under Section 12 of the Exchange Act is required to disclose on a yearly basis in its annual report on Form 20-F its repurchases of its securities. The disclosure provided relates to the issuer's securities in ordinary share form, whether the issuer has repurchased the shares itself or depository receipts that represent the shares. The price data and other data should be stated in the same currency used in the issuer's primary financial statements.

One commenter noted that many foreign private issuers are subject to regulatory regimes in their home countries with respect to the repurchase of shares and suggested that these issuers be permitted to include disclosure in their Form 20-F annual reports that was based on home country disclosure requirements instead of our proposed disclosure requirements.¹⁰⁶ We have not adopted this view because, under Item 16E as adopted, investors will be afforded disclosure of the same type of information with respect to share repurchases whether the issuer in question is a foreign private issuer or a domestic issuer. In addition, it would not appear unduly burdensome for foreign private issuers to gather and disclose the type of summary information required under Item 16E, nor are we aware that the disclosure of this information would conflict with any country's law. Lastly, to the extent a foreign private issuer files public reports pursuant to its home country requirements with respect to share repurchases, the issuer can file those reports under Form 6-K if the issuer deems those reports material to investors.

The final rules also require footnote disclosure of the principal terms of publicly announced repurchase plans or programs, including: (1) The date of announcement, (2) the share or dollar amount approved, (3) the expiration

date (if any) of the plans or programs, (4) each plan or program that has expired during the period covered by the table, and (5) each plan or program that the issuer has determined to terminate prior to expiration or under which the issuer does not intend to make further purchases.

We initially proposed to require additional footnote disclosure of each plan or program that the issuer has not purchased under during the period covered by the table, and whether the issuer still intends to purchase under that plan or program. Several commenters opposed the proposed disclosure of an issuer's intent to make future purchases under an announced plan or program. One commenter noted that a board's authorization of a purchase plan or program typically is general enough as to provide management with considerable flexibility to respond to market conditions in executing the plan.¹⁰⁷ This commenter thought that requiring issuers to provide disclosure about their intent to make future purchases could be more misleading than helpful to investors.

Based on commenters' remarks, we have modified the footnote disclosure to instead require an issuer to disclose each plan or program under which the issuer does not intend to make further purchases. Because an issuer therefore will only have to provide this disclosure after it has made a determination to stop making purchases under a particular plan or program, there will be no need for the issuer to speculate about its future intent. The revision also will obviate the need for issuers to include boilerplate representations in their periodic reports indicating that they may continue to make purchases under announced plans or programs.

The table also must include footnotes that briefly disclose the nature of the transaction for purchases made other than pursuant to a publicly announced repurchase plan or program. These include, for example, open market and privately negotiated purchases, issuer tender offers, purchases made by the issuer upon another person's exercise of outstanding put rights, and in other transactions through which the company purchases its Section 12 registered equity securities.

We believe information about how much common stock the issuer has repurchased is important to investors.¹⁰⁸ Studies have shown that

¹⁰⁷ *Id.*

¹⁰⁸ In the past, we had proposed requiring issuers that intended to repurchase more than 2% of their stock in a twelve-month period to disclose specified

¹⁰⁰ See comment letters from SIA and WVS.

¹⁰¹ Of course, the Commission can request this information under a variety of circumstances. However, the submission to the Commission of the identity of the broker-dealer(s) would not be made public.

¹⁰² For purposes of Item 703 of Regulations S-K and S-B, and Item 8 of Form N-CSR, the term "equity securities" is defined in Section 3(a)(11) of the Exchange Act. For purposes of Form 20-F, the term "equity securities" is defined in General Instruction F to Form 20-F.

¹⁰³ These new disclosure requirements supplement such disclosure obligations as issuers have always had under existing antifraud and other provisions of the federal securities laws. Thus, compliance with new Item 703 of Regulations S-K and S-B, new Item 16E of Form 20-F or new Item 8 of Form N-CSR will not excuse an issuer from disclosure obligations arising under other provisions of the federal securities laws. See, e.g., 17 CFR 240.10b-5 and 17 CFR 240.12b-20.

¹⁰⁴ See adopted Item 703 of Regulations S-K and S-B (17 CFR 229.703 and 228.703), Item 2(e) of Forms 10-Q and 10-QSB, Item 5(c) of Forms 10-K and 10-KSB, Item 16(E) of Form 20-F, and Item 8 of Form N-CSR.

¹⁰⁵ *Id.*

¹⁰⁶ See comment letter from Sullivan.