

Implications of SEC Amendment to Insider Trading Safe Harbor for Canadian Issuers

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On December 14, 2022, the SEC adopted final rules amending Rule 10b5-1, a safe harbor from liability under the U.S. insider trading rules. The safe harbor permits directors, executive officers and others, including issuers, to engage in securities transactions while in possession of material non-public information, by entering into a binding contract, instruction or plan adopted prior to effecting the transaction and at a time when the seller or buyer was not in possession of material non-public information about the issuer.

The new rules include a number of measures intended to limit certain potentially abusive strategies permitted under the old rules and certain new disclosure requirements intended to enhance investors' understanding of the use of Rule 10b5-1 by insiders as well as other related disclosures.

The final rules will become effective February 27, 2023.

Canadian issuers, particularly those that are cross-listed in the United States, should be aware that:

- Canadian compliant “automatic plans” may not meet the technical requirements of new Rule 10b5-1, and thus may not provide a safe harbor under the U.S. insider trading rules.
- The reach of the U.S. insider trading rules may extend further than anticipated; the SEC staff has demonstrated an expansive view of its jurisdictional authority, in circumstance in which it concludes there are good policy reasons to do so.
- The U.S. insider trading prohibitions do not apply only to U.S. listed companies or SEC registrants; transactions involving securities of issuers in the OTC markets would also be subject to the rules.

Canadian issuers, as well as their directors, officers and shareholders, should review their existing insider trading policies and disclosure practices prior to the effective date, and determine what amendments or updates are appropriate in their circumstances.

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A summary of the new rules can be found [here](#) and a copy of the adopting release can be found [here](#).