

SEC Amends Insider Trading Safe Harbor and Requires New Disclosures to Address Insider Trading Risks

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On December 14, 2022, the SEC adopted final rules amending Rule 10b5-1, the safe harbor that allows 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 was not in possession of material non-public information about the issuer (a “Rule 10b5-1 plan”). 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 amendments will require many public companies, as well as their directors, officers and shareholders, to take concrete steps to amend their existing Rule 10b5-1 plans and disclosure practices prior to the effective date. The final rules will become effective 60 days following publication of the adopting release in the Federal Register, except as noted below.

A summary of the final rules is set forth below, and readers can find the adopting release [here](#).

Key takeaways from the Rule 10b5-1 amendments include:

- Existing 10b5-1 plans may continue to be relied upon after the effective date of the new rules (even if they are not compliant under the new rules) until they expire, are terminated or, if earlier, any modification or change is made to the amount, price or timing of the purchase or sale of securities under the plan.
- For insiders, employees and other non-issuers, new or amended 10b5-1 plans after the effective date will be subject to new “cooling off periods” during which no transactions can occur under the plan. This may require insiders and others to refrain from engaging in transactions for a period of time after any required updates are made.
- For issuers, internal policies and procedures will need to be updated to ensure that its and its insiders’ plans satisfy the new rules, and that the necessary information is collected to permit the issuer to satisfy the new disclosure requirements. Issuers should also reevaluate their written insider trading policies prior to the required

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publication of those policies under the new rules.

- Issuers that maintain equity compensation programs that rely on Rule 10b5-1 plans for open market purchases will need to consider the effect of the new rules on the structure of those compensation programs, as well as the potential impact of the new rules on the ability of insiders that participate in such programs to rely on Rule 10b5-1 for other transactions.
- Finally, the new rules require additional detailed disclosure around the grant of option awards to certain insiders. Issuers should plan to update the committee or Board responsible for such grants to ensure that the new rules are addressed in grants made after the effective date.

Rule 10b5-1 Amendments

The final rules amend Rule 10b5-1 to provide that, among other things:

- All persons, other than the issuer, must observe a new “cooling off period” between the time that a Rule 10b5-1 plan is adopted and the date of any transaction made in reliance upon the plan. The required cooling off period for directors or officers (as defined in Rule 16a-1(f)) will be the later of (1) 90 days following plan adoption, or (2) two business days following the disclosure of the issuer’s financial results for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification). Persons who are not directors or officers will be subject to a shorter 30-day cooling off period.
- Any modification or change to the amount, price or timing of the purchase or sale of securities under a Rule 10b5-1 plan, including any other change that has any of these effects, will be deemed to be a termination of the plan and the adoption of a new plan. Consequently, a new cooling off period must be observed following the adoption of the new plan and that new plan must meet the requirements of Rule 10b5-1 at the time of adoption.
- No person, other than the issuer, may have more than one Rule 10b5-1 plan in effect at any one time, except for (1) a Rule 10b5-1 plan that is limited to the sale of that number of securities necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, and the insider does not otherwise exercise control over the timing of such sales (a “qualified sell-to-cover plan”); (2) separate contracts with multiple brokers that taken together, work as a single plan and satisfy all of the applicable requirements; or (3) a “replacement” plan that complies with the applicable cooling off period and under which no transactions will occur until the previous plan expires.
- Rule 10b5-1 plans that are designed to be satisfied in a single open market transaction cannot be used by a non-issuer more than once in a 12-month period, except for qualified sell-to-cover plans.
- Rule 10b5-1 plans must be operated in good faith, without any alteration or deviation from the plan, and without entering into or altering a corresponding or hedging transaction or position in the securities. While the new rules do not limit the ability of a person to terminate a Rule 10b5-1 plan, any subsequent non-Rule 10b5-1 transactions will need to be carefully considered to avoid an unfavorable inference.
- For directors and officers, the plan must include a certification that, on the date of adoption of the plan, the individual director or officer is not aware of any material nonpublic information about the security or issuer, and the director or officer is adopting the plan in good faith and not as part of a plan or scheme to evade the rules. The disclosure of material non-public information known to the insider at the time of adoption but disclosed prior to any trades will not be sufficient to permit reliance upon Rule 10b5-1 (though it may protect against liability in the event of a subsequent

claim).

The amendments to Rule 10b5-1 will be effective 60 days after publication in the Federal Register, subject to the grandfathering provisions discussed above.

Section 16 Amendments

The rules relating to Section 16 reporting were amended to provide that:

- Form 4s and Form 5s must identify those transactions intended to qualify for the Rule 10b5-1 safe harbor.
- Bona fide gifts of equity securities that are subject to Section 16 reporting must be reported on a Form 4 within two business days after the gift, rather than on Form 5 within 45 days after the end of the calendar year.

The amendments to Forms 4 and 5 will be effective for beneficial ownership reports filed on or after April 1, 2023.

New Disclosures in Quarterly and Annual Reports and Proxy Statements

New disclosures must be provided in quarterly and annual reports and proxy statements, as follows:

- Quarterly, an issuer's Form 10-Q and Form 10-K must include disclosures regarding the existence and material terms (other than price) of any Rule 10b5-1 plan or similar plan of a director or officer.
- A Form 10-K or Section 14A proxy statement must include the following new disclosures:
 - the issuer's policies and practices on the timing of awards of options in relation to the disclosure of material nonpublic information by the issuer, including how the board determines when to grant awards, whether the board or compensation committee takes material nonpublic information into account when determining the timing and terms of awards and whether the issuer has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation;
 - a table discussing any options granted to named executive officers in the period beginning four business days prior to the filing of a Form 10-Q or 10-K, or the filing or furnishing of a Form 8-K that discloses any other material nonpublic information, and ending one business day after the filing (provided that smaller reporting companies and emerging growth companies may limit the table to a different group of officers);
 - whether the issuer has adopted insider trading policies and procedures for directors, officers and employees, or the issuer itself, and if not, why it has not done so; and
 - filing as an exhibit to the Form 10-K a copy of any such insider trading policies and procedures.
- A foreign private issuer filing an annual report on Form 20-F is required to disclose whether it has adopted insider trading policies and procedures for directors, senior management and employees, and if not, why it has not done so, and to file as an exhibit a copy of any such insider trading policies and procedures.

- The foregoing disclosures must generally be tagged in inline XBRL.

Issuers will be required to comply with the amendments to Forms 10-Q, 10-K and 20-F and Section 14A beginning with the first filing that covers the first full fiscal period that begins on or after April 1, 2023 (October 1, 2023 for smaller reporting companies). So, for an issuer with a December 31 fiscal year end that is not a smaller reporting company, the amendments to Form 10-Q will take effect for the quarter ended June 30, 2023 and the amendments to Form 10-K and 20-F will take effect for the annual filing for fiscal year ended December 31, 2024.