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SEC Adopts Amendments to Rule 10b5-1: 8 Things to Know

Yesterday, the SEC adopted new rules that:

- Amend Rule 10b5-1 to add new conditions to the availability of the affirmative defense to insider trading liability,
- Impose new disclosure requirements for periodic reports, proxy and information statements regarding insider trading policies, trading plans of insiders and option grant practices, and
- Amend Section 16 filing requirements.

Here are the SEC's [press release](#), [fact sheet](#) and [adopting release](#). Here are eight things to know about the new rules:

1. Mandatory Cooling-Off Period – Rule 10b5-1 plans adopted by directors and Section 16 officers must not permit trading under the plan until the later of (a) 90 days after plan adoption or modification and (b) two business days after disclosure of financial results in the Form 10-Q or 10-K for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days).

Persons other than directors and Section 16 officers have a cooling-off period of 30 days. The SEC is not at this time adopting a cooling-off period for issuer 10b5-1 plans.

2. Restrictions on Overlapping and Single-Trade Plans – Multiple overlapping plans are prohibited for all persons, except for: (a) plans that authorize sell-to-cover transactions to satisfy tax withholding obligations on vesting of compensatory equity awards where the insider has no control over timing of the sales (this exception does not include sales incident to the exercise of stock options) and (b) trades under contracts with multiple broker-dealers or agents that constitute a "single plan" for securities held in different accounts.

For single-trade plans, the affirmative defense is limited to one such plan during any consecutive 12-month period. At this time, the SEC is not adopting a proposed limitation on overlapping and single-trade plans for issuers.

3. Written Certifications When Entering into Plans – Directors and Section 16 officers must certify at the time of adoption or modification of a Rule 10b5-1 plan (a) that they are not aware of material nonpublic information about the issuer or its securities and (b) that they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5. Many plans already require such certification.

4. Annual Reporting of Insider Trading Policies and Procedures and Quarterly Reporting on Use of Trading Plans – Companies must disclose in their Form 10-K and proxy or information statements whether they have insider trading policies and procedures that promote compliance with applicable laws and listing standards, or explain why they have not adopted such policies and procedures. Companies must file their insider trading policy as an exhibit to the Form 10-K unless it is contained in the company's code of ethics that is filed.

Companies also must disclose in their Form 10-Qs and Form 10-K the adoption or termination (including modification) of Rule 10b5-1 trading plans by directors and Section 16 officers during the last quarter, and the material terms of the plan (other than price), including the name of the director or officer, date of adoption or termination, duration of the plan, the aggregate number of securities subject to the plan and a description of any modification. Disclosure would also be required of other trading arrangements that are not designed to satisfy the Rule 10b5-1 requirements.

These insider trading policy and use of trading plan disclosures must be tagged with Inline XBRL.

5. Narrative and Tabular Disclosure About Timing of Option Grants – Companies must provide proxy statement disclosure about their policies and practices regarding the timing of option grants in relation to the disclosure of material nonpublic information, including how the board determines when to grant such awards, such as whether awards are granted on a predetermined schedule, and whether and if so how the board takes material nonpublic information into account when determining the timing and terms of an award.

A new table must report any options granted to a named executive officer within four business days before the filing of a periodic report or the filing or furnishing of a Form 8-K that contains material nonpublic information (including earnings information) and ending one business day after a triggering event, including the exercise price, grant date fair value and percentage change in the market value of the securities underlying the option the trading day before – and the trading day after – the disclosure of the material nonpublic information. The disclosure must be tagged using Inline XBRL format.

6. New Checkbox on Forms 4 and 5 – Insiders must indicate via a new checkbox on Forms 4 or 5 whether the reported transactions were made pursuant to a Rule 10b5-1 trading arrangement. Many insiders already make this disclosure voluntarily via footnote.

7. Gifts Must Be Reported on Form 4 (Not Form 5) – Gifts of securities that were previously permitted to be reported on a deferred basis on Form 5 are now required to be reported within two business days on Form 4.

8. Timing – The amendments to Rule 10b5-1 will be effective 60 days after publication of the adopting release in the Federal Register. Rule 10b5-1 plans entered into prior to the effective date will not be affected unless they are modified. The periodic report and proxy statement disclosure amendments will be required for filings that cover the first full fiscal period that begins on or after April 1, 2023, except that the applicable date for smaller reporting companies is October 1, 2023. Section 16 reporting persons need to comply with the amendments to Forms 4 and 5 for reports filed on or after April 1, 2023.

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