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Corp Fin Clarifies Compliance Dates for New Section 16 Amendments

As described in [our earlier blog](#), the SEC adopted amendments to Rule 16b-3 last month requiring that dispositions by gift of securities previously permitted to be reported on a deferred basis on Form 5 will soon be required to be reported within two days on Form 4.

As reported on Section16.net, Corp Fin apparently has provided oral informal guidance clarifying that the effective date for gift reporting on Form 4 is February 27, 2023 (not April 1st as many had understandably thought given language in the SEC's adopting release). Corp Fin also orally confirmed that gifts made before February 27, 2023 may still be reported on Form 5 within 45 days after the end of the fiscal year in which the gifts were made. Acquisitions by gift remain eligible for reporting on a Form 5.

The SEC also amended Forms 4 and 5 by adding a new checkbox to indicate whether the reported transactions were made pursuant to a Rule 10b5-1 plan and requiring disclosure of the date of adoption of the 10b5-1 plan. These changes will apply to all Forms 4 and 5 filed on or after April 1, 2023.

Gifting While Aware of Material Nonpublic Information. In the adopting release, the SEC notes that gifts can be a "sale or other disposition" subject to Section 10(b) liability, giving as an example a donor who gifts securities "in fraudulent breach of a duty of trust and confidence when the donor was aware of material nonpublic information about the security or issuer, and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information."

The adopting release also points to academic studies that note that "a gift followed closely by a sale, under conditions where the value at the time of donation and sale affects that tax or other benefits obtained by the donor, may raise the same policy concerns as more common forms of insider trading." The adopting release goes on to say that the affirmative defense under Rule 10b5-1(c)(1) is available when a donor gifts under a 10b5-1 plan. In light of the SEC's focus on potential liability in connection with the gifting of securities, companies should consider addressing this topic in their insider trading policies and 10b5-1 plan guidelines.

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