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May 31, 2023

Rule 10b5-1 Plans: Corp Fin Issues Three CDIs



Last week, Corp Fin issued [Exchange Act Rules CDIs](#) to address a few outstanding implementation questions for the new Rule 10b5-1 amendments.

The first two deal with the compliance dates. Importantly, these CDIs clarify that, while the new *quarterly* reporting requirements regarding adoption and termination of Rule 10b5-1 plans will be required in the near term (generally in the next Form 10-Q for companies other than smaller reporting companies), the *annual* reporting requirements regarding insider trading policies and timing of equity grants will not be required until the report covering the full fiscal year that begins on or after the applicable compliance date. For calendar year companies, that will be the Form 10-K for 2024.

The third CDI clarifies that, for a person with two Rule 10b5-1 plans that are structured to be in place serially, the second plan would be subject to a new applicable cooling-off period if the person affirmatively terminates the first plan rather than allowing it to end on its own terms.

Here are the new CDIs:

Question 120.26: When are companies required to begin providing the quarterly Item 408(a) disclosures and the annual Item 402(x) and Item 408(b) disclosures (Item 16J of Form 20-F disclosures for foreign private issuers) in periodic reports?

Answer: Release No. 33-11138 states that companies other than smaller reporting companies will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F "in the first filing that covers the first full fiscal period that begins on or after April 1, 2023."

Therefore, the following compliance dates apply:

– December 31 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-Q for the period ended June 30, 2023, and should continue to be provided in the Form 10-Q for the period ended September 30, 2023 and the Form 10-K for the fiscal year ended December 31, 2023.

– June 30 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-K for the fiscal year ended June 30, 2023.

– December 31 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.

– June 30 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2024.

Smaller reporting companies must comply with these new disclosure and tagging requirements in the first filing that covers the first full fiscal period that begins on or after October 1, 2023. Therefore, the following compliance dates apply:

– December 31 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-K for the fiscal year ended December 31, 2023.

– June 30 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-Q for the period ended December 31, 2023.

– December 31 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.

– June 30 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2025. [May 25, 2023]

Question 120.27: When are companies required to begin providing the disclosures in proxy or information statements?

Answer: For transition purposes only, companies other than smaller reporting companies must first provide this information in proxy statements for the first annual meeting for the election of directors (or information statements for consent solicitations in lieu thereof) after completion of the first full fiscal year beginning on or after April 1, 2023. Smaller reporting companies must first provide this information in proxy statements for the first annual meeting for the election of directors (or information statements for consent solicitations in lieu thereof) after completion of the first full fiscal year beginning on or after October 1, 2023. [May 25, 2023]

Question 120.28: The Rule 10b5-1(c) affirmative defense generally is not available if a person has multiple Rule 10b5-1 contracts, instructions, or plans in place. However, Rule 10b5-1(c)(1)(ii)(D)(2) permits a person (other than the issuer) to maintain two separate Rule 10b5-1 plans at the same time so long as trading pursuant to the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or have expired without execution. If an individual terminates the earlier-commencing plan (i.e., the earlier-commencing plan does not end by its terms and without any action by the individual), when can trading begin under the later-commencing plan?

Answer: Pursuant to Rule 10b5-1(c)(1)(ii)(D)(2), if an individual terminates the earlier-commencing plan, the later-commencing plan will be subject to an "effective cooling-off period." The effective cooling-off period will begin on the termination date of the earlier-commencing plan and will last for the time period specified in Rule 10b5-1(c)(1)(ii)(B). On the other hand, if the earlier-commencing plan ends by its terms without action by the individual, the cooling-off period for the later-commencing plan is not reset and trading may begin as soon as the plan's original cooling-off period is satisfied. Depending on when the later-commencing plan was adopted, this could be as soon as immediately after the earlier-commencing plan ends. See Footnote 180 of Release No. 33-11138. [May 25, 2023]

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