

SEC Adopts Final Rules on Rule 10b5-1 Trading Plans and Related Company Disclosure Obligations

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On December 14, 2022, the Securities and Exchange Commission (SEC) adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934. The adopted amendments modify rules applicable to the affirmative defense to insider trading liability available for Rule 10b5-1 trading plans and also impose new disclosure requirements on issuers with respect to these trading plans.

Many company insiders have utilized Rule 10b5-1 trading plans since the rule was originally adopted over 20 years ago. While many issuers already impose certain trading plan safeguards such as cooling-off periods, there has been growing concern by the SEC and others that these plans potentially enable insiders to effectively time trades while in possession of material nonpublic information and abuse the affirmative defense afforded by Rule 10b5-1.

New Conditions for Availability of Rule 10b5-1 Affirmative Defense

To address these concerns of potential abuse by insiders of Rule 10b5-1 trading plans, the amendments modify Rule 10b5-1 to add the following new conditions to the availability of affirmative defenses under the rule:

- *Cooling-Off Periods:* The amendments add a cooling-off period after the plan's adoption or modification before any trading can occur under the Rule 10b5-1 plan by directors and officers of an issuer. The cooling-off period ends on the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in the applicable SEC periodic report 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). For insiders other than the issuer or a director or officer of the issuer, the rules impose a cooling-off period of 30 days following plan adoption or modification. Notably, while the proposed rules would have applied the 30-day cooling off period to issuers as well, the final rules do not (although the SEC noted that further consideration of potential application of a cooling-off period to issuers is warranted).
- *Certification:* If directors and officers adopt a 10b5-1 plan, they must separately certify to the issuer in writing that, at the time of the plan's adoption or modification: (1) they are not aware of any material nonpublic information; and (2) the plan is being adopted in good faith, not as part of a plan or scheme to evade the prohibitions under Rule 10b-51.

- *Restrictions on Overlapping Plans:* Directors and officers and other persons who are insiders, other than issuers, may not have multiple overlapping Rule 10b5-1 plans in place at any time (subject to certain limited exceptions).
- *Restrictions on Single-Trade Plans:* Directors and officers and other persons who are insiders, other than issuers, can only utilize one single-trade Rule 10b5-1 plan during any consecutive 12-month period.
- *Expanded Good Faith Condition:* For all persons who are insiders, including issuers, the amendments impose an express requirement that all persons act in good faith with respect to the Rule 10b5-1 plan (and not just in connection with entering into the plan).

New Disclosure Requirements

The amendments also create new disclosure requirements for issuers and new filing requirements for Section 16 filers, including:

- Issuer disclosure of Rule 10b5-1 plans:
 - Quarterly disclosure of any director's or officer's adoption, termination, or modification of either a Rule 10b5-1 plan or another pre-planned trading arrangement, as well as a description of the material terms of such Rule 10b5-1 plan or other trading arrangement, including:
 - The name and title of the director or officer;
 - The date of adoption or termination of the Rule 10b5-1 plan or other trading arrangement;
 - The duration of the Rule 10b5-1 plan or other trading arrangement; and
 - The aggregate number of securities to be sold or purchased under the Rule 10b5-1 plan or other trading arrangement.
 - Annual disclosure of the issuer's insider trading policies and procedures.
- Certain tabular and narrative disclosures around stock options, stock appreciation rights and similar option-like instruments granted to corporate insiders where the award was close in time to the release of material nonpublic information and related policies and procedures;
- For Section 16 filers:
 - A checkbox on Section 16 forms to indicate that a reported transaction was intended to satisfy the Rule 10b5-1 affirmative defense conditions; and
 - A requirement to report dispositions of bona fide gifts of equity securities on Form 4 (rather than Form 5) within two business days following the transaction's execution.

Implementation of New Rules

The amended rules take effect 60 days after their publication in the Federal Register, and are expected to become effective in the first quarter of 2023. The new disclosure requirements on Forms 4 and 5 will take effect on April 1, 2023. Issuers, with the exception of smaller reporting companies, will be required to comply with the new disclosure requirements in Exchange Act periodic reports on Forms 10-Q, 10-K, and 20-F and in any proxy or information statements in the first filing that covers the first full fiscal period beginning on or after April 1, 2023 (or, in the case of smaller reporting companies, on or after October 1, 2023).

The affirmative defense available under an existing Rule 10b5-1 plan that was entered into prior to the effective date of the amendments will remain unaffected by the amendments, unless the plan is modified or changed after the effective date of the amendments.

Winston Takeaway. Public companies should become familiar with the newly amended rules. To ensure compliance, companies should (i) review their insider trading policies and amend their guidelines to comply with the new rules, (ii) review option and option-like grant practices to account for new disclosure requirements for awards granted near in time to the release of material nonpublic information, and (iii) incorporate the newly required disclosures into their disclosure controls and procedures.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice Group, Capital Markets Practice Group, or your Winston relationship attorney for further information.

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