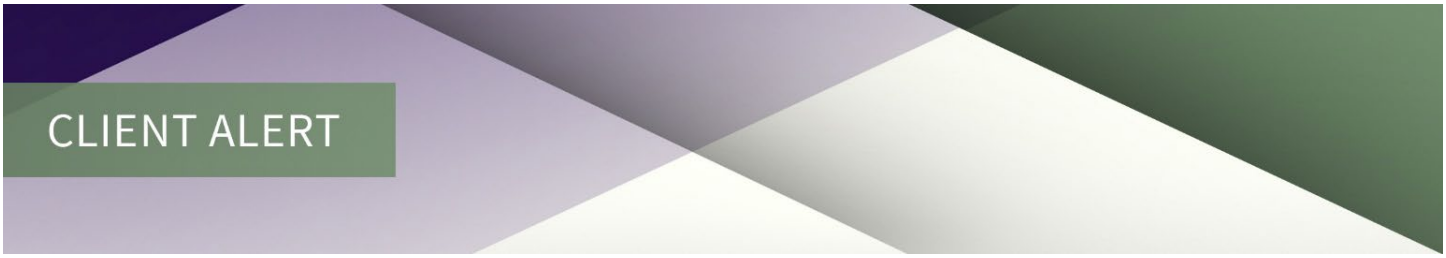

SEC Adopts Amendments to Rule 10b5-1 Insider Trading Plans and Related Disclosures

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On December 14, 2022, the Securities and Exchange Commission (the "SEC" or the "Commission") voted unanimously to adopt amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act") and new related disclosure requirements (the "Rule 10b5 1 Plan Amendments"). In particular, the Rule 10b5-1 Plan Amendments:

- Add new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1), including cooling-off periods for directors, officers,[1] and other persons (excluding the applicable issuer);
- Create new disclosure requirements regarding insider trading policies, the adoption, modification and termination of trading arrangements by officers and directors, and the material terms (other than pricing terms) of each trading arrangement;
- Create new disclosure requirements as to options and similar types of awards granted to executives and directors close in time to an issuer's disclosure of material nonpublic information ("MNPI") and as to company policies regarding such grants;
- Require filers of Forms 4 and 5 to identify transactions made pursuant to a Rule 10b5-1 plan; and

[1] *See* Rule 16a-1(f) for the definition of "officer."

- Require disclosure of gifts of securities on Form 4.[2]

I. Background

The Commission adopted Rule 10b5-1 in 2000; this rule prohibits, among other things, the making of any untrue statement of a material fact or the omission of a material fact necessary in order to make the statements made, in light of the circumstances, not misleading.[3]

Rule 10b5-1(c)(1) provides an affirmative defense to liability for insider trading under Section 10(b) of and Rule 10b-5 under the Exchange Act in circumstances where a trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan for the trading of securities adopted when the trader was not aware of MNPI (a "Rule 10b5-1 plan").[4]

A Rule 10b5-1 plan is required to: (i) specify the amount of securities to be purchased or sold and the price and date thereof; (ii) provide a written formula or algorithm, or computer program, for determining amounts of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; and (iii) not permit the trader to exercise any later influence over how, when, or whether to effect purchases or sales under the plan. A Rule 10b5-1 plan also must be entered into in good faith and not as a part of a scheme to evade the prohibitions of Rule 10b5-1.[5]

In the 10b5-1 Plan Adopting Release, the Commission noted that it was adopting the Rule 10b5-1 Plan Amendments to address certain potentially abusive practices associated with Rule 10b5-1 plans, grants of options and other equity instruments, and the gifting of securities. The Commission provided that courts, commenters and members of Congress have expressed concern that certain traders have sought to benefit from the affirmative defenses of Rule 10b5-1(c)(1) while trading securities on the basis of MNPI. The Commission also noted that some academic studies have found that the returns on trading by insiders pursuant to Rule 10b5-1 plans consistently outperform the returns on trading by insiders when not conducted under such plans.[6]

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2 *See* Rule 10b5-1 and Insider Trading Arrangements and Related Disclosures, Exchange Act Release No. 96492 (Dec.14, 2022) [87 FR 80362 (Dec. 29, 2022)] (the "10b5-1 Plan Adopting Release"), *available* here. *See also* Rule 10b5-1 and Insider Trading, Release No. 33–11013 (Jan. 13, 2022) [87 FR 8686 (Feb. 15, 2022)] (proposing release), *available* here; Willkie Farr & Gallagher LLP, Client Memorandum: SEC Proposes Amendments to Rules Governing Share Repurchases and Rule 10b5-1 Plans (Dec. 23, 2021), *available* here.

3 *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881 (Aug. 15, 2000) (the "2000 Adopting Release"), *available* here

4 *See* Rule 10b5-1(c)(1); *see also* the 2000 Adopting Release *supra* note 3.

5 *See* Rule 10b5-1; Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 12-13.

6 *Id* at 9.

II. Amendments to Rule 10b5-1

The Rule 10b5-1 Plan Amendments add several new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1). The SEC amended Rule 10b5-1(c)(1) to:

(i) apply a cooling-off period between entry into a Rule 10b5-1 plan and commencement of purchases or sales under the plan by persons (other than the issuer) relying on the affirmative defense;

(ii) impose a certification requirement on directors and officers;

(iii) limit the ability of persons other than the issuer to use multiple overlapping Rule 10b5-1 plans and limit the use of single-trade plans by persons other than the issuer to one such single-trade plan in any 12-month period; and

(iv) add a condition that all persons entering into a Rule 10b5-1 plan must act in good faith with respect to that plan not only upon entry into the plan but also throughout the life of the plan.[7]

A. Cooling-Off Period

The Rule 10b5-1 Plan Amendments establish mandatory cooling-off periods before purchases or sales pursuant to a Rule 10b5-1 plan may commence, which periods are applicable to all persons other than the issuer. Rule 10b5-1 plans entered into by directors and officers may commence purchases or sales after the later of: (i) 90 days after adoption; or (ii) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20-F or Form 6-K that discloses the issuer's financial results.[8] In any event, the cooling-off period is not required to exceed 120 days after plan adoption.[9]

For persons other than directors, officers and the issuer, the required cooling-off period is instead 30 days.[10] The Rule 10b5-1 Plan Amendments do not impose a cooling-off period for issuers that structure share repurchase plans as Rule 10b5-1 plans, although the SEC indicated that it is "continuing to consider whether regulatory action is needed to mitigate any risk of investor harm from the misuse of Rule 10b5-1 plans by [issuers]" and notes that voluntary adoption of cooling-off periods by issuers "may significantly mitigate the risk of investor harm."[11]

The SEC also adopted a new paragraph to Rule 10b5-1(c)(1) that specifies modifications to Rule 10b5-1 plans that would be deemed to be a termination of such a plan and adoption of a new plan, and thus would trigger a new cooling-off period.

7 *Id.* at 10-11.
8 *See* Rule 10b5-1(c)(1); *see also* § 249.308a (Form 10-Q); *see also* § 249.310 (Form 10-K).
9 *Id.*; Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 27.
10 *Id.* at 28.
11 *Id.* at 33.

The amended Rule deems a modification or change to the amount, price, or timing of the purchase or sale of the securities (or a modification or change to a written formula or algorithm, or computer program that affects the amount, price, or timing of the purchase or sale of the securities) underlying a Rule 10b5-1 plan to be a termination of such plan, and the adoption of a new plan.[12] For example, a plan modification, such as the substitution or removal of a broker that is executing trades pursuant to a Rule 10b5-1 arrangement on behalf of the person, that changes the price or date on which purchases or sales are to be executed, is a termination of such plan and the adoption of a new plan.[13]

Modifications that do not change the sale or purchase prices or price ranges, the amount of securities to be purchased or sold or the timing of transactions will not trigger a new cooling-off period.[14]

B. Director and Officer Certifications

The Rule 10b5-1 Plan Amendments require each director and officer who adopts a Rule 10b5-1 plan to include a representation in the plan certifying that at the time of the adoption of a new or modified Rule 10b5-1 plan: (i) he or she is not aware of any MNPI about the security or issuer; and (ii) he or she is adopting the Rule 10b5-1 plan in good faith and not as a plan or scheme to evade the prohibitions of Rule 10b-5.[15] The SEC noted that the certification would not create an independent basis of liability for insider trading.[16]

C. Restricting Multiple Overlapping Rule 10b5-1 Trading Arrangements and Single-Trade Arrangements

Currently, a person is not entitled to the Rule 10b5-1(c)(1) affirmative defense for a trade if he or she enters into or alters a "corresponding or hedging transaction or position" with respect to the planned transactions.[17] In the 10b5-1 Plan Adopting Release, the SEC indicated that multiple overlapping Rule 10b5-1 plans can be used to evade this prohibition on hedging and in other ways that might allow MNPI to factor into the trading decision of an insider who had complied with the other provisions of Rule 10b5-1.[18]

The Rule 10b5-1 Plan Amendments add a condition to the affirmative defense that any officer, director or other person (excluding the issuer) who has entered into the plan may not have another outstanding (and may not subsequently enter

12 *See* Rule 10b5-1(c)(1)(iv).

13 Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 36.

14 *Id.* at 36; *see also* Rule 10b5-1(c)(1).

15 In the proposal, this certification was to be prepared as a separate document and presented to the issuer. Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 43.

16 *Id.* at 46.

17 *Id.* at 47; *see* Rule 10b5-1(c)(1).

18 Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 47.

into any additional) Rule 10b5-1 plan for purchases or sales of any class of securities of the issuer on the open market during the same period.[19]

The restriction on multiple overlapping Rule 10b5-1 plans is subject to three exceptions. First, a series of contracts with different broker-dealers or agents acting on behalf of a person to execute trades may be treated as a single "plan" where, taken together, the contracts otherwise satisfy the conditions of the rule.[20] Second, two separate Rule 10b5-1 plans may be maintained at the same time so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expire without execution.[21] Third, an insider may maintain an additional Rule 10b5-1 plan if the plan only authorizes qualified sell-to-cover transactions.[22]

The Rule 10b5-1 Plan Amendments also limit the availability of the affirmative defense under Rule 10b5-1(c)(1) for a single-trade Rule 10b5-1 plan (a Rule 10b5-1 plan designed to effect the open-market purchase or sale of the total amount of securities in a single transaction) to one such plan during any 12-month period for all persons, other than the issuer.[23] This single-trade limitation will not apply to a plan that only authorizes qualified sell-to-cover transactions.

D. Amended Good-Faith Conditions

The Rule 10b5-1 Plan Amendments provide that the affirmative defense under Rule 10b5-1(c)(1) is available only if the person who entered into the Rule 10b5-1 plan "has acted in good faith with respect to" the plan.[24] The new condition is in addition to the existing requirement that a Rule 10b5-1 plan be entered into in good faith.[25] The new requirement is intended to clarify that a person that cancels or modifies a Rule 10b5-1 trading plan in an effort to evade the prohibitions of Rule 10b-5, or who improperly influences the timing of corporate disclosures to benefit his or her own trades, would not be able to rely on the affirmative defense. The good-faith requirement will not apply to activities outside the control or influence of the insider.[26]

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19 *Id.* at 53; *see* Rule 10b5-1(c)(1).

20 *Id.* at 56. In addition, an insider will not lose the benefit of the affirmative defense where the insider closes a securities account with a financial institution and transfers the securities to a different financial institution. However, a plan modification that changes the purchase or sale amount, the price, or the date of purchases or sales is a termination of the prior plan and the adoption of a new plan with the new broker. *Id.* at 57.

21 *Id.* at 57. This provision would not be available for the later-commencing plan, however, if the first trade under the later-commencing plan is scheduled to begin during the "effective cooling-off period." *Id.* at 58.

22 *Id.* at 58. A "sell-to-cover" transaction is one in which an insider instructs his or her agent to sell securities to satisfy tax withholding obligations at the time an award vests. *Id.*

23 *Id.* at 49.

24 *Id.* at 67.

25 *Id* at 66; *see* 2000 Adopting Release, *supra* note 3.

26 *See* Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 67-68.

III Additional Disclosures Regarding Rule 10b5-1 Plans

A. Quarterly Reporting of Rule 10b5-1 and Non-Rule 10b5-1 Trading Arrangements

As part of the Rule 10b5-1 Plan Amendments, the SEC adopted new Item 408(a) of Regulation S-K, which requires registrants to disclose in its Forms 10-Qs and 10-K (and Form 20-F for a foreign private issuer) whether any director or officer has adopted or terminated any Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement during the registrant's last fiscal quarter.[27] Item 408(a) also requires registrants to provide a description of the material terms (other than pricing information) of such Rule 10b5-1 plan or non-Rule 10b5-1 trading arrangement. The required disclosures include: (i) the name and title of the director or officer; (ii) the date of adoption or termination of the trading arrangement; (iii) the duration of the trading arrangement; and (iv) the aggregate number of securities to be sold or purchased under the trading arrangement.[28] As noted above, certain plan modifications constitute terminations of the old plan and adoption of a new plan and thus would be required to be disclosed.

B. Disclosure of Insider Trading Policies and Procedures

New Item 408(b) of Regulation S-K requires a registrant to disclose whether it has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the registrant itself that are reasonably designed to promote compliance with insider trading laws.[29] If a registrant has not adopted such policies and procedures, it must explain why it has not done so. This disclosure must be made in annual reports on Form 10-K, and in proxy and information statements on Schedule 14A and Schedule 14C, except that foreign private issuers must provide similar disclosure in their annual reports on Form 20-F.[30] Registrants are required to file a copy of their insider trading policies and procedures as an exhibit to Forms 10-K and 20-F, as the case may be. If the registrant's insider trading policies and procedures are contained in the registrant's code of ethics, the filing of the code of ethics would obviate the need to separately file the insider trading policies and procedures.[31]

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27 *Id.* at 76. A "non-Rule 10b5-1 trading arrangement" for directors or officers exists where (i) the director or officer asserts that, at a time when they were not aware of MNPI about the security or the issuer of the security, they adopted a written arrangement for trading the securities; and (ii) the trading agreement (A) specifies the amount of securities to be purchased or sold and the price at which and the date on which the securities are to be subsequently purchased or sold; (B) includes a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which the securities are to be purchased or sold; or (C) does not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales. *Id.* at 79.

28 *Id.* at 76.

29 *Id.* at 81.

30 Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 84; *see* § 249.220f (Form 20-F).

31 *Id* at 85.

C. Tagging Requirement

The amendments will require registrants to tag information specified by Regulation S-K Items 408(a) and (b) as well as information specified by Item 402(x) (discussed below), and the parallel amendments to Form 20-F in Inline XBRL. As a result, the disclosures must be in block text and provide tagging of quantitative amounts disclosed within the narrative.

D. Identification of Rule 10b5-1 and Non-Rule 10b5-1 Transactions on Forms 4 and 5

The Rule 10b5-1 Plan Amendments also added a Rule 10b5-1(c) checkbox as a mandatory disclosure requirement on Forms 4 and 5.[32] A Form 4 or 5 filer will be required to indicate via checkbox whether a transaction reported on that form was made with the intent to satisfy the affirmative defense conditions of Rule 10b5-1(c) and provide the date of the Rule 10b5-1 plan.[33] Filers also have the option to provide additional relevant information about the reported transaction.[34]

IV. Disclosure Regarding Option Grants and Similar Equity Instruments Made Close in Time

The 10b5-1 Plan Adopting Release notes that a concern of the Commission has been "bullet-dodging," which is the practice of delaying a planned option award until the release of MNPI that is likely to decrease the company's stock price, and "spring-loading," which is the practice of timing option grants to occur immediately before the release of positive MNPI. The Commission expressed concern that existing disclosure requirements did not provide investors with adequate information as to an issuer's policies and practices on stock option awards timed to precede or follow the release of MNPI.[35] New Item 402(x) of Regulation S-K was adopted by the SEC in the Rule 10b5-1 Plan Amendments to add tabular and narrative disclosure requirements regarding grants of options, stock option rights ("SARs") and similar option-like instruments made close in time to an issuer's disclosure of MNPI and as to company policies regarding such grants.

The tabular disclosure requirements oblige registrants to provide a table containing information about grants of options, SARs and similar option-like instruments that were awarded to named executive officers within a window of four business days before or one business day after filing a periodic report on Form 10-Q or Form 10-K, or filing or furnishing a current report on Form 8-K (other than a current report on Form 8-K disclosing a material new option award grant under Item 5.02(e) of that form) that contains MNPI.[36] The issuer must provide the following information on an aggregated basis for each such award: the name of the named executive officer, the grant date, the number of securities underlying the award,

[32] *Id.* at 90; *see* Form 4, *supra* note 30; *see* Form 5, *supra* note 30.

[33] Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 90-92; *see* Form 4 *supra* note 30; *see* Form 5 *supra* note 30.

[34] Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 90-92.

[35] *Id* at 95.

[36] *Id* at 103.

the per-share exercise price, the grant date fair value of the award and the percentage change in market price of the underlying securities between the closing price one trading day prior to and following the release of the MNPI.

With respect to the narrative disclosure, a registrant must discuss its policies and practices on the timing of awards of stock options, SARs and/or similar option-like instruments in relation to the disclosure of MNPI by the registrant, including: (i) how the board determines when to grant such awards; (ii) whether and, if so, how the board or compensation committee takes MNPI into account when determining the timing and terms of an award; and (iii) whether the registrant has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.[37]

V. Reporting of Gifts on Form 4

As noted in the 10b5-1 Plan Adopting Release, the previous filing requirements could under certain circumstances permit Section 16 reporting persons to report gifts more than one year after the date of the gift. The Rule 10b5-1 Plan Amendments will require individuals who are required to report under Section 16 of the Exchange Act to report dispositions of bona fide gifts of equity securities (i.e., donations but not the receipt) on Form 4 (rather than Form 5) within two business days after such gift is executed.[38] The SEC further clarified that the affirmative defense of Rule 10b5-1(c) would be available for any bona fide gift made by the insider of securities, including a gift that might otherwise cause the donor to be subject to liability under Section 10(b) because when making the gift the donor had MNPI about the security or the issuer and knew or was reckless in not knowing that the donee would sell the securities prior to disclosure of the MNPI.[39]

VI. Compliance Date

The final rules are effective on February 27, 2023, 60 days after publication in the Federal Register. The amendments to Rule 10b5-1(c)(1) would not affect the affirmative defense available under an existing Rule 10b5-1 plan that was entered into prior to the revised rule's effective date, except to the extent that such a plan is modified or changed in the manner described in Rule 10b5-1(c)(iv) after the effective date of the final rule.

Compliance with the amendments to Forms 4 and 5 is required for beneficial ownership reports filed on or after April 1, 2023.[40] Smaller reporting companies will be required to comply with the new disclosure and tagging requirements in periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statements in the first filing that cover the first full fiscal period that begins on or after October 1, 2023.[41] All other issuers will be required to comply with the

[37] *Id.* at 97.

[38] *Id.* at 108-112; *see* Form 4, *supra* note 30.

[39] Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 112.

[40] *Id.* at 115.

[41] *Id.*

disclosure and tagging requirements in periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statements in the first filing that cover the full fiscal period that begins on or after April 1, 2023.[42]

VII. Takeaways

A cooling-off period, discouraging amendments or modification to Rule 10b5-1 plans, discouraging or not permitting a person to have multiple Rule 10b5-1 plans trading at the same time, and discouraging the use of single-trade Rule 10b5-1 plans have been recommended Rule 10b5-1 plan best practices for officers and directors of public companies for a number of years. Certifications as to no MNPI by a director or officer in a Rule 10b5-1 plan were already required by all major broker-dealers.[43] However, a 90-day cooling off period for directors and officers is much longer than what most practitioners have traditionally recommended.

The exclusion of issuers from the conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1) set forth in the 10b5-1 Plan Adopting Release is a positive development (in practice issuers often have no cooling-off period), though share buybacks remain a controversial issue (including the proposed timing of disclosure of any buybacks) and "Share Repurchase Disclosure Modernization" remains on the SEC's Fall 2022 Regulatory Flexibility Agenda.[44] On December 7, 2022, the SEC reopened the comment period on the proposed amendments relating to share repurchases, as a result of the enactment of the Inflation Reduction Act of 2022. This Act imposes upon certain corporations a non-deductible excise tax equal to one percent of the fair market value of any stock of the corporation repurchased by such corporation during the taxable year. The Commission staff prepared a memorandum that discusses potential economic effects of the new excise tax, which memorandum is available as part of the public comment file.[45] The public comment period will close approximately January 12, 2023.

The requirement to report gifts within two days on Form 4 rather than on Form 5 at the end of a year seems like a positive change. It struck many practitioners as odd that a person could be making a filing on Form 5 to report a gift that occurred over 12 months previously.[46]

Given that insider trading policies of registrants will soon be required to be publicly filed, this would be a good time for registrants to review their policies and to update as necessary.

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[42] *Id.*

[43] *Id.* at 40.

[44] *See* Press Release, SEC Reopens Comment Period for Proposed Rule on Share Repurchase Disclosure Modernization (Dec. 7, 2022), *available* here.

[45] *See* Supplemental Analysis of the Potential Implications of the Recently Enacted Excise Tax on Share Repurchases for the Economic Effects of Share Repurchase Disclosure Modernization Amendments, Comm'n File No. S7-21-21 (Dec. 7, 2022), *available* here.

[46] Rule 10b5-1 Plan Adopting Release, *supra* note 2 at 109-111.

The requirements in the 10b5-1 Plan Adopting Release to provide tabular and narrative disclosure requirements regarding grants of options, SARs and similar option-like instruments made close in time to an issuer's disclosure of MNPI and as to company policies regarding such grants may cause companies to adjust their grant and disclosure policies to avoid being required to make any such disclosure.

Certain commenters were concerned that disclosure of the material terms (including pricing information) of Rule 10b5-1 trading arrangements would allow front-running of transactions under the plan by other traders. In response, the Commission removed the requirement to disclose the pricing terms of the arrangements but left in the other required disclosures. It remains to be seen whether front-running will still occur based on the other information still required to be disclosed.

As noted above, two separate Rule 10b5-1 plans may be maintained at the same time so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expire without execution. This will permit an insider to maintain Rule 10b5-1 plans that are continuously in effect so long as the latter plan is executed sufficiently in advance of expiration of the first plan.

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