

## Alert | Corporate



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# SEC Adopts Final Amendments to Rule 10b5-1 and New Disclosure Requirements

### Go-To Guide:

- Additional Conditions to Assert 10b5-1(c) Affirmative Defense
- New Disclosure Requirements Regarding 10b5-1 Trading Plans and Insider Trading Policies
- Changes to Section 16 Filings

### Background

On Dec. 14, 2022, the Securities and Exchange Commission (SEC) adopted **significant amendments** to Rule 10b5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”) and new rules and disclosure requirements associated with 10b5-1 trading plans meant to address the SEC and other industry participants’ views of potential abuses under the current insider trading regime, including “cooling-off” periods for insiders, prohibitions on overlapping plans, certain insider certifications, and other requirements summarized below.

The final rules will become effective Feb. 27, 2023. Issuers (including, with certain exceptions, foreign private issuers) are required to comply with the new disclosure requirements in Exchange Act periodic reports and proxy or information statements in the first filing that covers the first full fiscal period beginning on or after April 1, 2023. The final amendments defer by six months the date of compliance

with the additional disclosure requirements for smaller reporting companies. Section 16 reporting persons are required to comply with the amendments to Forms 4 and 5 for reports filed on or after April 1, 2023.

### **Amendments to Rule 10b5-1(c) Affirmative Defenses**

Rule 10b5-1(c) under the Exchange Act provides an affirmative defense to insider trading for trades made under predetermined trading plans established when the person trading was not aware of any material nonpublic information. The changes to the rule amend and increase the conditions that must be met for assertion of the 10b5-1(c) affirmative defense.

*Cooling-Off Periods:* One of the most significant changes is the introduction of a mandatory cooling-off period between the time a new 10b5-1 trading plan is adopted and when the first trade is made under the plan, with the length of the cooling-off period varying based on the specific type of party adopting a new plan. (Even prior to these amendments, however, many investment banks required a 30-day cooling-off period as best practice.)

- 10b5-1 trading plans for officers and directors will require a cooling-off period before any trades are made the later of (i) 90 days after adoption or modification<sup>1</sup> and (ii) two business days after filing of an issuer's financial results for the fiscal quarter in which the plan was adopted or modified (not to exceed 120 days).
- 10b5-1 trading plans for persons other than officers or directors will require a cooling-off period before any trades of 30 days after adoption or modification.
- Issuer 10b5-1 plans do not require a cooling-off period under the new rules, but the SEC noted that it is continuing to evaluate this and is considering whether rule changes are needed in the context of proposed amendments to Rule 10b-18.

*Prohibition on Overlapping Plans:* Subject to certain specific qualifications and exceptions, the rule amendments also introduce a new prohibition on overlapping 10b5-1 trading plans and limit the ability to rely on the affirmative defense for single-trade or “one-and-done” plans to one single-trade plan per 12-month period for all persons other than issuers.

*Good Faith Condition/D&O Representations:* Although Rule 10b5-1(c) already required that the trading plan be entered into in good faith, the rule amendments add a requirement that the person establishing a 10b5-1 trading plan must also have “acted in good faith with respect to” the plan and any trading thereunder for the affirmative defense to be available.

10b5-1 trading plans of a director or officer of an issuer must include representations in the plan certifying that such director or officer is not aware of any material nonpublic information and is adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.

*Grandfathering:* The rule amendments provide for the grandfathering of Rule 10b5-1 plans that are in effect as of the effective date of the new rules, allowing such plans to continue in valid existence without needing to be amended. However, if a grandfathered plan is modified or amended in a manner that changes the amount, price, or timing of transactions scheduled under the plan, such plan will be deemed

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<sup>1</sup> Note, however, that a modification that does not change the sales or purchase prices or price ranges, the number of securities to be sold or purchased, or the timing of transactions under a Rule 10b5-1 Plan (such as an adjustment for stock splits or a change in account information) generally will not trigger a new cooling-off period.

effectively terminated and replaced with a new plan, which plan and any trading thereunder would be subject to the new rules and requirements, including the cooling-off periods.

### **Additional Disclosures**

The new rules (including new Items 402(x), 408(a), and 408(b) of Regulation S-K and new Item 16J of Form 20-F) require more comprehensive disclosure about issuers' policies and procedures related to insider trading, including quarterly disclosure by issuers reporting on Form 10-Q (or Form 10-K for the fourth fiscal quarter) regarding the use of Rule 10b5-1 trading plans and certain other trading arrangements by its directors and officers.

*Trading Plans:* The new rules will require quarterly disclosure by domestic issuers, using Inline XBRL, whether any director or officer has adopted, modified, or terminated any trading plan or arrangement (whether or not intended to comply with Rule 10b5-1(c)) over the course of the prior quarter, as well as a description of the material terms of such plan or arrangement, including the name and title of the director/officer, the date of adoption or termination, the duration of the arrangement, the total number of securities to be bought or sold under the arrangement, and whether such arrangement is intended to satisfy Rule 10b5-1. (The foregoing requirements will not apply to foreign private issuers, however.)

*Insider Trading Policies:* The new rules will also require annual disclosure by all issuers, using Inline XBRL, on Form 10-K (or Form 20-F) and on proxy and information statements whether they have adopted insider trading policies and procedures governing insider transactions in its securities (and if not, to explain why not). Issuers can incorporate such disclosures by reference in a proxy or information statement for the election of directors if filed within 120 days of the end of its fiscal year. The insider trading policies and procedures must be filed an exhibit to the Form 10-K (or Form 20-F).

*Option Grants:* The new rules will also require disclosure by domestic issuers, using Inline XBRL, regarding policies and practices on the timing of awards of stock options, stock appreciation rights and/or similar option-like instruments in relation to the disclosure of material nonpublic information by the issuer, including how the board determines when to grant such awards; whether and how the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award; and whether the issuer has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation. The new rules will require tabular disclosure of any option awards beginning four business days before the filing of a periodic report (on Form 10-Q or Form 10-K) or the filing or furnishing of a current report on Form 8-K that discloses material nonpublic information, including earnings information, and ending one business day after a triggering event (other than an 8-K under Item 5.02(e) disclosing a material new option award). (The foregoing requirements will not apply to foreign private issuers, however.)

### **Amendments Affecting Forms 4 and 5**

*Checkbox:* Forms 4 and 5 have been amended to include a new checkbox for filers to indicate if a reported transaction was intended to satisfy the affirmative defense requirements of Rule 10b5-1(c).

*Gifts:* The new rules will require reporting persons to disclose dispositions involving bona fide gifts on Form 4, rather than on Form 5 as was allowed previously, and to do so within the standard two-business-day deadline following the disposition of the gift.

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