

SEC Amends Conditions for 10b5-1 Plans and Imposes Additional Disclosure Requirements on Public Companies

On December 14, 2022, the U.S. Securities and Exchange Commission (SEC) adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the Exchange Act) to add new conditions to the rule that provide an affirmative defense to insider trading claims. The amendments also create new disclosure requirements regarding public companies' insider trading policies and procedures and the adoption and termination (including modification) of Rule 10b5-1 and certain other trading arrangements by directors and officers and make changes to insider reporting under Section 16 of the Exchange Act.

This alert summarizes the most important aspects of the amended rule. The amendments take effect starting on February 23, 2023. Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023. Public companies will be required to comply with the new disclosure requirements in Exchange Act periodic reports on Forms 10-Q and 10-K and in any proxy or information statements in the first filing that covers the first full fiscal period that begins on or after April 1, 2023. The final amendments defer the date of compliance with the additional disclosure requirements for smaller reporting companies by six months (until fiscal periods that begin on or after October 1, 2023).

Changes to Rule 10b5-1

The rule changes amend the Rule 10b5-1(c)(1) affirmative defense to insider trading liability to include:

- A cooling-off period for directors and officers of the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in a Form 10-Q or Form 10-K of the company'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) before any trading can commence under the trading arrangement.
- A cooling-off period of 30 days for persons other than issuers, directors and executive officers before any trading can commence under the trading

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arrangement or modification.

- A condition for directors and officers to include a representation in their Rule 10b5-1 plan certifying, at the time of the adoption of a new or modified plan, that: (1) they are not aware of material nonpublic information about the company or its securities; and (2) they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.
- A limitation on the ability of anyone other than issuers to use multiple overlapping Rule 10b5-1 plans.
- A limitation on the ability of anyone other than issuers to rely on the affirmative defense for a single-trade plan to one such plan during any consecutive 12-month period.
- A condition that all persons entering into a Rule 10b5-1 plan must act in good faith with respect to that plan.

New Disclosure Requirements for Public Companies

The amendments also create new disclosure requirements under the Exchange Act that include:

- Quarterly disclosure by registrants regarding the use of Rule 10b5-1 plans and certain other written trading arrangements by a company's directors and officers for the trading of its securities, including adoption or termination of such a plan or arrangement. Such disclosure must include the:
 - Name and title of the director or officer;
 - Date on which the director or officer adopted or terminated the trading arrangement;
 - Duration of the trading arrangement; and
 - Aggregate number of securities to be purchased or sold pursuant to the trading arrangement.
- Annual disclosure of a company's insider trading policies and procedures in its Form 10-K and proxy statement. Because this Form 10-K disclosure requirement is in Part III, it can be incorporated by reference from the proxy statement as long as it is filed within 120 days after fiscal year-end. The new

disclosure requirements include:

- The company must disclose whether it has adopted insider trading policies and procedures governing the purchase, sale and/or other dispositions of the registrant's securities by directors, officers and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations, and any listing standards applicable to the registrant. If the company has not adopted such policies and procedures, it must explain why it has not done so.
- If the company has adopted insider trading policies and procedures, it must file such policies and procedures as an exhibit to the Form 10-K. If all of the company's insider trading policies and procedures are included in its code of ethics, and the code of ethics is filed as an exhibit to the Form 10-K, that would satisfy this exhibit requirement.
- Tabular and narrative disclosures in proxy statements regarding awards of options close in time to the release of material nonpublic information and related policies and procedures.
- The required disclosures must be tagged as Interactive Data Files.

Change to Form 4 and Form 5 Reports

Form 4 and Form 5 have been amended to include a checkbox for the filer to identify whether a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Next Steps

In order to prepare for the rules, a public company should review its insider trading policy to determine if changes should be made to reflect the new conditions for Rule 10b5-1 plans. It may also be a good opportunity to review and modernize the insider trading policy overall before the requirement that it be filed takes effect. Public companies should implement control procedures to ensure compliance with the new disclosure requirements, consider policies to address the timing of option grants under the new disclosure rules and review equity compensation plans and grant procedures for potential changes. Any checklists for reviewing 10b5-1 plans by insiders should incorporate the new conditions for such plans.



If you have any questions about the amended rules, changes to your policies and procedures or other securities law matters, please contact [Benjamin Lombard](#), another member of the Securities Team or your Reinhart attorney.

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