

Client Alert

SEC Issues Final Amendments for Rule 10b5-1 Trading Plans

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On December 14, 2022, the SEC released final amendments to the Rule 10b5-1 trading plans.¹ Rule 10b5-1 provides an affirmative defense to insider trading for individuals and issuers that trade stock under a plan that was entered in good faith at a time when they do not possess material nonpublic information. The final amendments provide additional requirements in order to avail oneself of the affirmative defense to insider trading allegations.

Final Rule 10b5-1 Amendments

The SEC released the proposed amendments to Rule 10b5-1 insider trading plans in SEC Release No. 33-11138 (December 14, 2022).² According to SEC Chair Gary Gensler, “Over the past two decades...we’ve heard from courts, commenters, and members of Congress that insiders have sought to benefit from the rule’s liability protections while trading securities opportunistically on the basis of material nonpublic information. I believe today’s amendments will help fill those potential gaps.”

With the objective of addressing perceived abusive practices relating to 10b5-1 plans, the final amendments change the Rule 10b5-1(c)(1) requirements to qualifying for the affirmative defense to insider trading to include:

- A cooling-off period for directors and officers equal to the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in certain periodic reports 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 plan.
- A cooling-off period of 30 days for persons other than issuers, directors, or officers before any trading can commence under the trading plan or modification.
- A requirement that directors and officers include a representation in their Rule 10b5-1 trading plan, that at the time of the adoption or modification of the plan: (1) they are not aware of material nonpublic information about the issuer 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.

¹ See SEC Press Release: [SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures](#) (December 14, 2022).

² This SEC Release is available at: [33-11138.pdf \(sec.gov\)](#).

- A limitation on the ability of anyone other than issuers to use multiple overlapping Rule 10b5-1 trading plans. Note, however, that an exception to the multiple overlapping plan provision is a “sell to cover” plan where the plan is used to sell only such securities as are necessary to satisfy tax withholding obligations incident to the vesting of a compensatory award, such as restricted stock, and the insider does not otherwise exercise control over the timing of such sales.
- 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 single-trade plan is essentially a plan intended to execute an open market transaction to buy or sell securities in a single transaction.
- A condition that all persons entering into a Rule 10b5-1 trading plan must act in good faith with respect to that plan.

The final amendments also introduce a number of new disclosure requirements, including:

- Quarterly disclosure on Form 10-Q or 10-K by companies regarding adoption, amendment, or termination of Rule 10b5-1 trading plans and the material terms of such plans, including name and title of executives or directors, the date the plan was adopted, amended, or terminated, the plan duration, and the total amount of securities to be purchased or sold under the plan.
- Annual disclosure on Form 10-K or annual proxy statement of a company’s insider trading policies and procedures.
- New proxy disclosure that requires a discussion of a company’s policies and practices on the timing of option awards in relation to the disclosure of material nonpublic information.
- Certain tabular and narrative disclosures regarding awards of options close in time to the release of material nonpublic information and related policies and procedures.
- Tagging of the required disclosures using XBRL.
- A requirement that Forms 4 and 5 filers indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

Timing

These final amendments become effective 60 days after publication in the *Federal Register*. Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 filed on and after April 1, 2023. Companies will be required to comply with the new disclosure requirements in Forms 10-Q, 10-K, and 20-F and in proxy or information statements in the first filing that covers the full fiscal period that begins on or after April 1, 2023 (filings beginning in the second quarter of 2023 for calendar year companies). Smaller reporting companies were given a six-month delay in complying with the final amendments.

Next Steps

Companies should be prepared to comply with new disclosure under the rules, including 10-Q, 10-K, proxy, and Forms 4 and 5 changes. Further, executives and directors should be made aware of the more stringent requirements that are necessary to adopt, amend, or terminate a trading plan that is intended to comply with the 10b5-1 affirmative defense to insider trading allegations.



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