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# SEC Strengthens Investor Protections Against Insider Trading

Insights
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***Final Rules Impose Mandatory Waiting Periods for Individuals and Other New Restrictions on Rule 10b5-1 Trading Plans, and Enhanced Trading-Related Disclosure and Reporting Obligations, Including for Option Grants and Stock Gifts***

**Overview**

On December 14, 2022, the U.S. Securities and Exchange Commission (SEC), displaying a rare united front, voted unanimously to adopt the first substantive reforms to Rule 10b5-1 under the Securities Exchange Act of 1934 (Exchange Act) since its enactment more than twenty years ago, and enhanced trading-related disclosure and reporting requirements applicable to public issuers and their insiders.

The final SEC rulemaking comes amid heightened Department of Justice (DOJ) and SEC interest in investigating and enforcing perceived abuses of Rule 10b5-1 plans (10b5-1 plans), which provide issuers and corporate insiders with an affirmative defense to insider trading liability if they meet certain conditions set forth in the rule, and is designed to improve transparency for investors and help deter potential misuse of such plans.

The final rules:

- **add significant new conditions to the availability of the affirmative defense to insider trading liability under Rule 10b5-1(c)(1)**, depending on the type of insider, including:

  - mandatory waiting or “cooling-off” periods delaying the first trades after a 10b5-1 plan is adopted or modified;
  - written certification requirements;
  - restrictions on multiple overlapping 10b5-1 plans;
  - limitations on single-trade 10b5-1 plans;
  - expanded good faith obligation;
- **create detailed and comprehensive new disclosure requirements for issuers** regarding:
  - the adoption, modification and termination of 10b5-1 and certain other trading plans by their directors and Section 16 officers,[1] and the material terms of such plans;
  - their insider trading policies and procedures;
  - awards of stock options, stock appreciation rights (SARs) and similar option-like instruments granted to named executive officers (NEOs) close in time to their release of material nonpublic information (MNPI); and
- **enhance reporting obligations for Section 16 filers** with respect to transactions made pursuant to 10b5-1 plans and stock gifts.

The new disclosure requirements apply broadly across domestic public issuers, including emerging growth companies (EGCs) and smaller reporting companies (SRCs), although SRCs will have an additional six-month transition period to provide the disclosures. Foreign private issuers (FPIs) are subject only to the new disclosure mandates regarding insider trading policies and procedures.

Overall, the final rules are less onerous than the rule proposals released in December 2021 (which we discussed in our earlier client alert) and, partly in response to commenter feedback, include several important exceptions for issuers. In its final rulemaking, the SEC elected to exclude issuers from the application of all of the new affirmative defense conditions except for the expanded good faith obligation (which requires insiders to “act in good faith” with respect to a 10b5-1 plan), and, at least for now, **10b5-1 plans used for issuer share repurchases are not subject to cooling-off periods or restrictions on overlapping and single-trade 10b5-1 plans**. **The final rules also eliminated provisions that would have mandated quarterly**

**disclosure regarding issuers' adoption, modification and termination of 10b5-1 and other trading plans and their material terms**.

In the adopting release, the SEC notes, in each case, that these requirements are not being imposed on issuers "at this time," but it believes further consideration of their potential application to issuers is warranted and 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 the issuer, such as in the share repurchase context." It is possible the SEC may revisit certain of these provisions as part of its pending rulemaking on issuer share repurchases, which it expects to finalize in 2023. See "Reopening of Comment Period for Share Repurchase Disclosure Rulemaking" below.

**Final Rules at a Glance**

**New Conditions to Rule 10b5-1(c)(1) Affirmative Defense**

10b5-1 plans adopted or modified with respect to the amount, price or timing of transa February 27, 2023 (the effective date of the final amendments to Rule 10b5-1) will be all of the following five new conditions in order for insiders to claim the protection of th insider trading liability, with different conditions applicable to different types of insiders

- ***For all persons other than the issuer***, **mandatory minimum cooling-off period** modification of 10b5-1 plans and the first trade thereunder: **90-120 days** for directo **30 days** for all other individuals (such as non-executive employees).
- ***For directors and Section 16 officers***, **written representations** when adopting o they are doing so in good faith and while not aware of MNPI about the issuer or its
- ***For all persons other than the issuer***, **restrictions on multiple overlapping 10b** trades involving any class of the issuer's securities, subject to limited exceptions, in withholding plans.
- ***For all persons other than the issuer***, **limitations on open-market single-trade** during any consecutive 12-month period, excluding sell-to-cover tax-withholding pla
- ***For all persons (including the issuer)***, **expansion of the existing good faith ob** time of adoption, but also throughout the duration, of 10b5-1 plans.

**New Issuer Disclosure Requirements**

In addition, the final rules create the following new disclosure requirements for issuers

- ***For domestic issuers***, **quarterly disclosure** in Form 10-Q and Form 10-K regardi and termination of 10b5-1 and other pre-planned (non-10b5-1) trading plans by thei officers, and the material terms of such plans.
- ***For domestic issuers and FPIs***, **annual disclosure** in the annual meeting proxy s regarding their policies and procedures related to insider trading, with copies requir their annual report.
- ***For domestic issuers***, **annual narrative and tabular disclosure** in the annual me 10-K) regarding awards of stock options, SARs and similar option-like instruments g and immediately after their release of MNPI.

**Enhanced Section 16 Reporting Obligations**

The final rules also impose the following enhanced reporting obligations on Section 1(

- ***For Section 16 filers***, **mandatory identification of 10b5-1 transactions** via a nev
- ***For Section 16 filers***, **accelerated reporting of dispositions of equity securities** SEC reiterates are subject to insider trading laws—on Form 4 within two business d

## Compliance Dates

### *10b5-1 Plans*

The final amendments to Rule 10b5-1 will become effective on **February 27, 2023**, and any 10b5-1 plans adopted thereafter must comply with the new conditions or the insider adopting the plan will not be able to rely on the affirmative defense.

The new affirmative defense conditions will not apply to existing 10b5-1 plans or plans entered into prior to February 27, 2023 unless they are modified after such date with respect to the **amount, price or timing** of the purchase or sale of the underlying securities, which would be equivalent to terminating the original plan and adopting a new plan on the modified terms that would trigger a new cooling-off period and must comply with the revised affirmative defense. The treatment of plan modifications under the final rules is discussed in more detail below.

### *Issuer Disclosure and Tagging Requirements*

Issuers that are not SRCs will be required to comply with the new disclosure and data-tagging requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F and in proxy or information statements in the first filing that covers the first

full fiscal period that begins **on or after April 1, 2023 (on or after October 1, 2023 for SRCs)**. For calendar-year-end issuers, this means:

***Quarterly Reporting***

- ***For non-SRCs***, the new quarterly reporting on 10b5-1 and other trading plans will take effect in the Form 10-Q for Q2 2023;
- ***For SRCs***, the new quarterly reporting on 10b5-1 and other trading plans will take effect in the fiscal 2023 Form 10-K filed in 2024;

***Annual Reporting***

- ***For all covered issuers***, the new annual reporting on insider trading policies and procedures will take effect in the 2025 proxy statement (or fiscal 2024 Form 10-K/20-F filed in 2025), with copies required to be filed as an exhibit to the fiscal 2024 Form 10-K/20-F; and
- ***For all covered issuers***, the new annual reporting on option grants will take effect in the 2025 proxy statement (or fiscal 2024 Form 10-K filed in 2025) with respect to option grants made in 2024.

***Forms 4 and 5***

Section 16 filers will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed **on or after April 1, 2023**.

**New Conditions to Rule 10b5-1(c)(1) Affirmative Defense**

As summarized below, the final rules introduce five new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability that "are designed to address concerns about abuse of the rule to trade securities opportunistically on the basis of [MNPI] in ways that harm investors and undermine the integrity of the securities markets." As of now, **only one of the five new conditions—the expanded good faith obligation—applies to issuers**; the other conditions apply to all non-issuer insiders, except for the written certification requirement, which applies only to directors and Section 16 officers.

***Mandatory Cooling-Off Periods***

Rule 10b5-1 as currently in effect does not impose any waiting periods delaying the first trades after a 10b5-1 plan is adopted or modified. To increase the likelihood that any MNPI an insider may hold when adopting or modifying a plan becomes stale by

the time trades are made under the plan, the final rules mandate the following minimum cooling-off periods for individuals between the adoption or modification of a 10b5-1 plan and execution of the first trade thereunder, with the duration dependent on the type of insider adopting or modifying the plan:

- ***For directors and Section 16 officers***, the later of (i) 90 days following plan adoption or modification and (ii) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K (a Form 6-K or Form 20-F in the case of FPIs) for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification).[2]

  This is shorter than the fixed 120-day cooling-off period contemplated by the proposal but longer than prevailing market practices, which can be as short as one or two months.

- ***For persons other than the issuer who are not directors or Section 16 officers (e.g., non-executive employees)***, 30 days following plan adoption or modification.

  No cooling-off period for such persons was originally proposed.

- ***For issuers***, no cooling-off period.

In a notable departure from the proposal, which would have required a minimum 30-day cooling-off period for issuers that use 10b5-1 plans in their share repurchase programs, the SEC elected in its final rulemaking not to impose such a requirement "at this time." The adopting release posits, however, that "the misuse of [MNPI] by issuers when trading in their own securities can result in significant investor harm because transactions by issuers often involve substantial quantities of securities," and the SEC continues to consider whether a mandatory cooling-off period for issuer 10b5-1 share repurchase plans is warranted.

***Plan Modifications***

Under the final rules, only certain types of modifications of existing 10b5-1 plans will trigger a new cooling-off period. New Rule 10b5-1(c)(1)(iv) codifies that any modification that changes **the amount, price or timing** of the purchase or sale of the securities underlying a 10b5-1 plan constitutes a termination of such plan and the adoption of a new plan on the modified terms that will trigger a new cooling-off period before any new trades can occur. By contrast, plan modifications that do not alter the foregoing terms (such as an adjustment for stock splits, a change in account information or other immaterial or administrative modifications) will not trigger a new cooling-off period.

***Director and Section 16 Officer Certifications***

***Directors and Section 16 officers*** adopting or modifying a 10b5-1 plan must include a written representation in the plan documents (as opposed to furnishing a standalone certification to the issuer, as proposed) certifying that:

- they are not aware of any MNPI about the issuer or its securities; and
- they are adopting or modifying the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.

In practice, most broker-dealer standard forms already require similar representations.

The SEC notes in the adopting release that the certification does not create an independent basis of insider trading liability for directors or Section 16 officers (though this is not explicitly stated in the rule text). Rather, the certification requirement is intended to "reinforce directors' and officers' cognizance of their obligation not to trade or enter into a trading plan while aware of [MNPI] about the issuer or its securities, that it is their responsibility to determine whether they are aware of [MNPI] when adopting Rule 10b5-1 plans, and that the affirmative defense under Rule 10b5-1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws."

Personal certifications are not required where a director or Section 16 officer terminates an existing 10b5-1 plan without adopting a new or modified plan.

***Restrictions on Multiple Overlapping Plans; Exception for Sell-to-Cover Tax-Withholding Plans***

To prevent insiders from adopting separate, concurrent 10b5-1 plans and subsequently selectively canceling certain trades under such plans while aware of MNPI (allowing them to buy or sell securities under the plans that provide the most advantageous price), the final rules prohibit ***persons other than the issuer*** from using multiple overlapping 10b5-1 plans for open-market transactions involving ***any class***[3] (rather than the *same class*, as proposed) of the issuer's securities, subject to **three limited exceptions** where the SEC believes the risk of opportunistic trading is low:

- **Sell-to-cover tax-withholding plans**. Plans authorizing "sell-to-cover" transactions structured as 10b5-1 plans under which an insider instructs their agent to sell only such securities as are necessary to satisfy tax-withholding obligations arising exclusively from the vesting of a compensatory award (such as restricted

stock or SARs), and the insider does not otherwise exercise control over the timing of the sales.

Importantly, **this exception does not extend to sales incident to the exercise of option awards**, which the SEC contends could create a risk of opportunistic trading as they are subject to the insider's control ("Option exercises occur at the discretion of the insider, and such decisions could occur when the insider later obtains [MNPI]."). The SEC notes, however, that the revised affirmative defense would not prevent an insider from entering into a 10b5-1 plan that includes instructions directing a broker to sell securities sufficient to meet the tax-withholding obligations incident to an option or similar award exercise.

- **Contracts with multiple brokers under a single plan**. A series of separate contracts with different broker-dealers or other agents acting on behalf of the person (other than the issuer) to execute trades thereunder, provided that, when taken together, they effectively function as a single "plan" and meet all applicable conditions of the rule, including that a modification of any individual contract acts as a modification of the entire series of contracts comprising the 10b5-1 plan.

  This exception recognizes the fact that an insider may hold their securities in separate accounts with different financial institutions and thus may need to use multiple brokers to execute trades under a single 10b5-1 plan.

  The final rules provide that an insider will not lose the benefit of the affirmative defense when substituting brokers authorized to trade under a 10b5-1 plan, so long as the purchase or sales instructions remain identical, including with respect to the prices, dates and amount of securities to be purchased or sold. However, a plan modification involving the substitution or removal of a broker that changes the amount of securities to be sold or purchased, the sales or purchase prices or price ranges, or the timing of transactions under the plan constitutes a termination of such plan and the adoption of a new plan that will trigger a new cooling-off period before any new trades can occur.

- **Later-commencing plans**. Two separate 10b5-1 plans maintained by persons (other than the issuer) 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 and the applicable cooling-off period has been satisfied.

  However, if the earlier-commencing plan is terminated early (i.e., before its scheduled completion date) rather than expiring pursuant to its terms, then the required cooling-off period for the later-commencing plan (after which trades

thereunder may begin) will run from the date of the early termination of the first plan (and not from the date of adoption of the later-commencing plan). The SEC explains that, absent this qualification, an insider might cancel the earlier-commencing plan before its scheduled completion but still trade under the later-commencing plan in fewer than the minimum days that would otherwise be required for a new plan that is established after a prior plan termination.[4]

The restriction on multiple overlapping plans applies only to transactions executed on the open market, and not to purchases and sales planned as part of employee benefit plans, employee stock ownership plans (ESOPs) or dividend reinvestment plans (DRIPs) that may be effected through 10b5-1 plans, since these transactions are conducted directly with the issuer and thus are less likely to give rise to insider trading concerns.

***Limitations on Single-Trade Plans; Exception for Sell-to-Cover Tax-Withholding Plans***

In the adopting release, the SEC cites recent research finding that single-trade plans are consistently loss-avoiding (regardless of cooling-off period) and their adoption often precedes stock price declines, which suggests that insiders using single-trade plans may be executing trades based on MNPI. To balance legitimate use of such plans, such as to address one-time liquidity needs, against the potential for abuse, the final rules limit ***persons other than the issuer*** to one single-trade 10b5-1 plan during any consecutive 12-month period. A single-trade plan is one "designed to effect" the open-market purchase or sale of the total amount of securities covered by that plan as a single transaction.[5]

Sell-to-cover tax-withholding 10b5-1 plans, as described above in the context of overlapping plans, are also exempt from this limitation.

As with the cooling-off period, the SEC elected in its final rulemaking not to adopt restrictions on overlapping and single-trade 10b5-1 plans for issuers "at this time," but continues to consider whether such restrictions are warranted.

***Expanded Good Faith Obligation***

To address concerns that insiders may take actions after adopting a 10b5-1 plan to benefit from MNPI acquired after establishment of the plan, the final rules require that ***all persons (including issuers)*** entering into a 10b5-1 plan must "act in good faith" with respect to the plan—i.e., not only when they enter into the plan, as currently required, but also on an ongoing basis.

The SEC notes that this change extends the good faith obligation from the time of adoption through the duration of the 10b5-1 plan, thus making clear that the affirmative defense to insider trading liability will not be available to an insider who terminates or modifies a plan to benefit their trading results.

The SEC underscores that the obligation to act in good faith applies to activities within the insider's control, and provides the following example of how an insider might violate the new requirement: "[A] corporate insider would not be operating a Rule 10b5-1 plan in good faith if the corporate insider, while aware of [MNPI], directly or indirectly induces the issuer to publicly disclose that information in a manner that makes their trades under a Rule 10b5-1 plan more profitable (or less unprofitable). In such a scenario, notwithstanding that the Rule 10b5-1 plan may have been adopted or entered into in good faith, the corporate insider would not be entitled to the affirmative defense."

Cancellations are not per se acting in bad faith. For example, "cancellations directed by the issuer where such cancellations are outside the control or influence of the insider [(e.g., an issuer halts trading by insiders under 10b5-1 plans due to a possible merger, or similarly blocks sales transactions after learning of MNPI that it expects will lead to a decline in the market price of its securities)] may not, by themselves, implicate the good faith condition."

**New Issuer Disclosure Requirements**

As summarized below, the final rules create detailed and comprehensive new trading-related disclosure requirements for issuers.

***Quarterly Disclosure Regarding Directors' and Section 16 Officers' Use and Material Terms of 10b5-1 and Other Pre-Planned (Non-10b5-1) Trading Plans***

Prior to the final rules, there were no mandatory disclosure requirements regarding the adoption, modification or termination of trading plans used by insiders. The SEC believes requiring this disclosure will provide greater transparency and valuable context to investors about how directors and officers use their trading plans, and could help deter potential abuses of such plans based on MNPI.

New Regulation S-K Item 408(a) requires domestic issuers to disclose on a quarterly basis in Form 10-Q and (for the fourth quarter) Form 10-K whether, during the most recently completed fiscal quarter, any director or Section 16 officer adopted, modified or terminated a 10b5-1 plan or other pre-planned trading plan not reliant on Rule 10b5-1 (as defined in new Regulation S-K Item 408(c))[6] for the trading of the

issuer's securities, together with a description of the material terms (other than price) of the plan, including:

- the name and title of the director or officer;
- the date of adoption, modification or termination of the plan;
- the duration of the plan;
- the aggregate number of securities to be sold or purchased under the plan; and
- whether the trading arrangement is a 10b5-1 plan or a non-10b5-1 plan.

The plans are not required to be filed with the SEC.

The SEC highlights in the adopting release that this disclosure will be subject to the certifications by the issuer's principal executive and financial officers required by Section 302 of the Sarbanes-Oxley Act (SOX). This disclosure also must be tagged using Inline XBRL.

FPIs are not required to provide this disclosure.

As with the cooling-off period and the restrictions on overlapping and single-trade 10b5-1 plans, the SEC elected in its final rulemaking not to require corresponding disclosure from issuers about their use of 10b5-1 and other trading plans to facilitate share repurchases "at this time," but continues to consider whether such a disclosure requirement is warranted.

***Annual Disclosure Regarding Insider Trading Policies and Procedures; Annual Report Exhibit***

Prior to the final rules, issuers were not required to disclose the details of their insider trading policies and procedures, and most do not. The SEC believes specific disclosures concerning issuers' insider trading policies and procedures could benefit investors by enabling them to assess issuers' corporate governance practices and to evaluate the extent to which those policies and procedures protect investors from the misuse of MNPI.

New Regulation S-K Item 408(b) and new Item 16J of Form 20-K require domestic issuers and FPIs to disclose in their annual meeting proxy statement (or Form 10-K/20-F) whether they have adopted insider trading policies and procedures governing the purchase, sale and other dispositions (such as through gifts) of their securities by directors, officers and non-executive employees, and by the issuer itself. This would

include any policies or procedures with respect to the issuer's share repurchases. Issuers that have not adopted insider trading policies and procedures must disclose why they have not done so.

A copy of any such policies and procedures must be filed as an exhibit to the Form 10-K/20-F (a description of such policies and procedures is not required in the body of the applicable SEC filing, as proposed). If all of the issuer's insider trading policies and procedures are included in its filed code of ethics, a hyperlink to that exhibit accompanying the issuer's disclosure as to whether it has insider trading policies and procedures will satisfy this requirement. Posting the policies and procedures on the corporate website in lieu of the exhibit filing will not satisfy this requirement.

The SEC explicitly notes that, for purposes of assessing the strengths and weaknesses of an issuer's insider trading policies and procedures and how its protections compare with those of its competitors, **investors may find useful certain information that some issuers currently may not include in their policies and procedures**, such as:

- "information on the issuer's process for analyzing whether directors, officers, employees or the issuer itself when conducting an open-market share repurchase have [MNPI];
- the issuer's process for documenting such analyses and approving requests to purchase or sell its securities whether through Rule 10b5-1 plans or otherwise; and/or
- how the issuer enforces compliance with any such policies and procedures it may have."

This disclosure will be subject to the SOX Section 302 officer certification requirements, and must be tagged using Inline XBRL.

***Annual Disclosure Regarding Options Granted Close in Time to MNPI Releases***

The narrative and tabular disclosures required under new Regulation S-K Item 402(x) are intended to help investors evaluate the potential presence and effects of option spring-loading, which is the practice of timing option grants to occur shortly before the release of positive MNPI likely to result in an increase in the issuer's stock price.[7] The SEC views information about issuer policies and practices related to option grant timing near MNPI as material to investors, especially as they consider their say-on-pay and director election votes.

***Narrative Disclosure***

New Item 402(x)(1) requires domestic issuers, including EGCs and SRCs, to provide in their annual meeting proxy statement (or Form 10-K) narrative disclosure about their policies and practices, if any, around the timing of awards of stock options, SARs and similar option-like instruments in relation to their release of MNPI, including:

- how the board of directors determines when to grant such awards (for example, whether awards are granted on a predetermined schedule);
- whether the board of directors or compensation committee takes MNPI into account when determining the timing and terms of an award and, if so, how; and
- whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.

The adopting release notes that issuers are not required to adopt such policies and practices if they have not already done so, or to modify any such existing policies.

***Tabular Disclosure***

New Item 402(x)(2) requires domestic issuers, including EGCs and SRCs, to provide in their annual meeting proxy statement (or Form 10-K) tabular disclosure, in the format shown here, of each award of stock options, SARs and similar option-like instruments granted, during the most recently completed fiscal year, to an NEO **within the period beginning four business days before, and ending one business day after**,[8] 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 disclosing MNPI (including earnings information, but excluding an Item 5.02(e) Form 8-K that solely reports the grant of a material new option award), including the following information for each such award:

- the name of the NEO;
- the grant date of the award;
- the number of securities underlying the award;
- the per-share exercise price;
- the grant-date fair value computed in accordance with FASB ASC Topic 718, *Stock Compensation*; and
- the percentage change in the closing market price of the underlying securities between the trading day immediately before and the trading day immediately after

the MNPI disclosure.

The stated purpose of the new table is “to highlight for investors options award grants that may be more likely than most to have been made at a time that the board of directors was aware of [MNPI] affecting the value of the award.”

**SRCs and EGCs are not exempt from the Item 402(x) disclosure requirements**, but may limit the NEOs subject to the tabular disclosure consistent with the scaled approach to their executive compensation disclosure.

The Item 402(x) disclosures do not apply to restricted stock or restricted stock units. They must be tagged using Inline XBRL. FPIs are not required to provide these disclosures.

**Enhanced Section 16 Reporting Obligations**

As summarized below, the final rules enhance certain reporting obligations for Section 16 filers.

***Mandatory Identification of 10b5-1 Transactions on Forms 4 and 5***

Today, the disclosure of a purchase or sale under a 10b5-1 plan in beneficial ownership filings is voluntary. To help investors and the public better discern whether 10b5-1 plans are being used to engage in opportunistic trading on the basis of MNPI, the final rules require Section 16 filers to indicate by a new, mandatory checkbox on Forms 4 and 5 if a reported transaction was made pursuant to a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and to disclose the date of the plan’s adoption under “Explanation of Responses.” In practice, many Section 16 filers already make this disclosure voluntarily via footnote.

***Accelerated Reporting of Gifts on Form 4***

To facilitate more timely visibility into insider gifts of stock, the final rules require Section 16 filers to report dispositions of equity securities by bona fide gifts on Form 4 within 2 business days following the date of execution of the transaction (rather than on Form 5 within 45 days after fiscal year-end, as currently permitted). *Acquisitions* by gift are still eligible for deferred reporting on Form 5.

This new requirement is intended to address concerns that the length of the Form 5 filing period, which can permit insiders to report gifts of securities more than one year after the date of the gift, may allow insiders to engage in “problematic” practices involving gifts of securities, such as making stock gifts while in possession of MNPI or

backdating stock gifts to maximize their tax benefits. (The adopting release notes, however, that the majority of insiders already report gifts on Form 4.)

In his public remarks endorsing both the proposed rules and the final rules, SEC Chair Gary Gensler stated plainly that **gifts of securities are subject to insider trading laws**. Notably, the SEC clarifies in the adopting release that **Rule 10b5-1(c)(1)'s affirmative defense is available for bona fide gifts of securities made under a 10b5-1 plan**, "including a gift that might otherwise cause the donor to be subject to liability under [Exchange Act] Section 10(b), because when making the gift the donor was aware of [MNPI] about the security or issuer and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information. In our view, the terms 'trade' and 'sale' in Rule 10b5-1(c)(1) include bona fide gifts of securities."

**Reopening of Comment Period for Share Repurchase Disclosure Rulemaking**

On December 7, 2022, the SEC reopened the public comment period, for the second time in less than a year, for the share repurchase disclosure rule changes it first proposed, together with the insider trading rule proposals, in December 2021. In connection with the reopening, the SEC made available a staff memorandum discussing potential economic effects of the new non-deductible 1% excise tax on certain share repurchases by domestic public issuers (effective January 1, 2023) imposed by the recently enacted Inflation Reduction Act of 2022 that is expected to inform its cost-benefit analysis underlying the final rules.

The extended comment period will expire on January 11, 2023, and we anticipate the SEC will move expeditiously thereafter to adopt final rules.

If adopted as proposed, the share repurchase rules would require significantly more granular, more frequent and more timely disclosure about issuer share repurchases, including detailed daily repurchase disclosure on a new Form SR, due one business day after execution of an issuer's share repurchase order, and expanded quarterly disclosures regarding the structure of an issuer's repurchase program and its share repurchases in periodic reports. More details are available in our client alert.

**Next Steps**

Public issuers and their insiders should be mindful of the heightened DOJ and SEC focus on investigating and enforcing perceived abuses of 10b5-1 plans as they revisit their current trading practices, policies and procedures in light of the new rules. Among the actions to consider taking now:

- Review and update existing insider trading policies and procedures and Rule 10b5-1 trading plan guidelines to implement the new mandatory cooling-off periods, certification requirements and restrictions on overlapping and single-trade plans, as applicable, and otherwise ensure they comply with the new conditions to the rule's affirmative defense by February 27, 2023 (the effective date of the final rules).

  To the extent it is not feasible for the board to adopt an amended insider trading policy by the February 27 effective date, the compliance officer under the policy should use their delegated discretion in the policy to require any new trading plans to meet the new Rule 10b5-1 requirements until an amendment to the policy formalizing such requirements can be adopted by the board.

  Existing 10b5-1 plans are grandfathered and do not need to be revised unless they are materially modified after the effective date.

- Confirm any sell-to-cover arrangements satisfy the SEC's definition of a qualified sell-to-cover arrangement exempt from the restrictions on overlapping and single-trade 10b5-1 plans.

- In anticipation of the new exhibit filing requirement, evaluate the need for any other changes to insider trading policies and procedures before having to publicly disclose their contents. For example, consider augmenting such policies and procedures to address the types of information the SEC has explicitly noted investors may find useful, if not already included therein.

- Review insider trading policies and procedures specifically with respect to the treatment of gifts, in light of the increased visibility into insiders' stock gifts accelerated Form 4 reporting will provide and the SEC's view regarding potential insider trading liability for gifts made while in possession of MNPI.

- Reassess existing policies and practices related to option grant timing near MNPI, if any, in light of the new disclosure requirements. Consider adjustments to avoid having to report option grants to NEOs in the new table and any inference such awards were opportunistically timed to take advantage of MNPI.

- Establish effective controls and procedures to gather information necessary for the new annual and quarterly disclosure obligations in future SEC filings, including for monitoring the timing of option grants near MNPI releases that fall within the prescribed reporting window and accelerated reporting of securities gifts on Form 4.

- Carefully consider the implications of public disclosure of directors' and Section 16 officers' use and material terms of 10b5-1 and other trading plans.
- Refresh the manuals provided to directors, Section 16 officers and other insiders that describe 10b5-1 plans and Section 16 filing obligations to reflect the new requirements, and provide related training on the new rules, particularly the accelerated Form 4 reporting requirement for stock gifts to prevent late filings.

**Related Materials**

- Press Release
- Fact Sheet
- Final Rule

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[1] Exchange Act Rule 16a-1(f) defines the term "officer" to include an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a significant policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer.

[2] The publication of an earnings release on Form 8-K prior to the filing of a Form 10-Q or Form 10-K will not shorten the cooling-off period. In the adopting release, the SEC states: "We disagree with commenters who suggested that there cannot be [MNPI] contained in a Form 10-Q or similar filing when the issuer has already announced its earnings results."

[3] In a change from the proposal, trades in different classes of securities will not be excepted from the restriction on multiple overlapping 10b5-1 plans, and thus this condition will preclude multiple concurrent plans where each relates to a different class of the issuer's securities. The SEC notes that greater investor-protection benefits are expected to accrue from applying the multiple overlapping plan restriction across all classes of securities.

[4] The adopting release provides the following illustrative example: "[A]n insider who is not a director or Section 16 officer [and thus is required to have a 30-day cooling-off period] has in place an existing 10b5-1 plan with a scheduled date for the latest authorized trade of May 31, 2023. On May 1, 2023, that insider adopts a later-commencing plan, intended to qualify for the affirmative defense under Rule 10b5-1, with a scheduled date for the first authorized trade of June 1, 2023. If the insider terminates the earlier-commencing plan on May 15, the later-commencing plan will

not receive the benefit of the affirmative defense, because June 1 is within 30 days of May 15, the date of termination of the earlier-commencing plan, and thus June 1 is during the 'effective cooling-off period.' However, if the later-commencing plan were scheduled to begin trading on July 1, 2023, it could still receive the benefit of the affirmative defense because July 1, 2023 is more than 30 days after May 15 and thus is outside the 'effective cooling-off period.'"

[5] The SEC explains that, for this purpose, a plan is "designed to effect" the purchase or sale of securities as a single transaction when the plan "has the practical effect of requiring such a result." Conversely, a plan is not designed to effect a single transaction where the plan leaves the person's agent discretion over whether to execute the plan as a single transaction. Similarly, a plan is also not designed to effect the purchase or sale of securities as a single transaction when (1) the plan does not leave discretion to the agent, but instead provides that the agent's future acts will depend on events or data not known at the time the plan is entered into (such as a plan providing for the agent to conduct a certain volume of sales or purchases at each of several given future stock prices) and (2) it is reasonably foreseeable at the time the plan is entered into that the plan might result in multiple transactions.

[6] Essentially, a written trading arrangement that satisfies the affirmative defense conditions of Rule 10b5-1 prior to the 2022 amendments (i.e., as adopted in 2000). The SEC explains that it is requiring disclosure for non-10b5-1 trading plans in recognition of the fact that corporate insiders may assert other defenses to liability under Exchange Act Section 10(b), and that "[a]bsent this disclosure requirement, directors and officers may be more likely to choose to trade in reliance on alternative defenses to liability other than [the Rule 10b5-1] affirmative defense in order to avoid the disclosure requirements for Rule 10b5-1 plans."

[7] In November 2021, the SEC published interpretive guidance in the form of Staff Accounting Bulletin No. 120 regarding the potential accounting implications of spring-loaded option grants.

[8] In the final rules, the SEC considerably narrowed the reporting window compared to the proposal, which would have required tabular disclosure of option awards granted within 14 calendar days before or after the relevant MNPI filing, including after an issuer share repurchase.

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