

Investment Management Alert

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SEC Rule 10b5-1 Amendments Provide New Perspective on Insider Purchases and Sales

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The Securities and Exchange Commission adopted rules on December 14, 2022 that will require:

- disclosure of whether trades by insiders are made pursuant to Rule 10b5-1 trading plans and
- companies to disclose insider adoption of such plans and disclose and publicly file the company's insider trading policies.

These new disclosures should provide investment advisers with a new perspective on insider purchases and sales and additional tools for analyzing companies.

The new rulemaking adds mandatory Rule 10b5-1 checkboxes to Forms 4 and 5 to identify whether a reported transaction was made pursuant to a plan that is "intended to satisfy the affirmative defense conditions" of Rule 10b5-1(c). The inclusion of this Form 4 checkbox and the mandatory "cooling off" period adopted by the SEC (as discussed below) may give analysts more insight into whether a trading decision by an insider was made opportunistically based on a present view of the issuer or was made pursuant to a plan adopted a minimum of 90-days prior to the trade based on a potentially stale viewpoint. Further, the presence of Form 4 filings reporting trades by officers and directors without the Rule 10b5-1 box checked could be taken as a signal that the officer or director believes that he or she is not in possession of material nonpublic information at the time of the transaction.

In addition to the above, the SEC's Rule 10b5-1 amendments also include:

- A cooling-off period for officers and directors of the later of (1) 90 days following plan adoption or modification and (2) two business days following the disclosure in periodic reports on Forms 10-Q, 10-K, 20-F or 6-K (as applicable) of the issuer'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 30-day cooling-off period for Rule 10b5-1 plans of persons other than issuers or directors and officers before any trading can commence under the trading arrangement.

Contact Information

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- A limitation on the ability of anyone other than issuers to use multiple overlapping Rule 10b5-1 plans.
- Representations in the newly adopted or modified Rule 10b5-1 plan from directors and officers certifying that they are not aware of material nonpublic information when adopting a new or modified Rule 10b5-1 plan and that 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 rely on the Rule 10b5-1(c) affirmative defense for a single-trade plan to one such plan during any consecutive 12-month period.

Investment advisers will now be able to review new mandatory disclosures in company quarterly reports detailing whether any director or officer has adopted or terminated a Rule 10b5-1 or other trading plan, as well as the material terms of any plan (other than pricing terms), such as the date of adoption or termination, name and title of any director or officer involved, duration of the plan and aggregate amount of securities subject to the plan. The new amendments also require companies to disclose annually if they have adopted an insider trading policy and to file any such insider trading policy as an exhibit to the issuer's annual report. Visibility into a company's insider trading policy will allow investment advisers to understand a company's open trading windows and blackout periods and whether reported trading has occurred during such periods.

Finally, the SEC is requiring the disclosure of bona fide gifts of securities on Form 4 within two business days after the date of the gift rather than on an annual Form 5 filing due 45 days after the end of the company's fiscal year.

The amendments will become effective 60 days following publication of the adopting release in the Federal Register. 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. Issuers that are not smaller reporting companies will be required to comply with the new disclosure requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F 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. Issuers that are smaller reporting companies will be required to comply with the new disclosure requirements in Exchange Act periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statements in the first filing that covers the first full fiscal period that begins on or after October 1, 2023.

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