SEC ADOPTS AMENDMENTS TO RULE 10B5-1 IMPOSING COOLING OFF PERIODS, NEW DISCLOSURE REQUIREMENTS AND OTHER CONDITIONS

On December 14, 2022, the SEC adopted amendments (full release available **here**) to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act"), imposing mandatory cooling off periods for 10b5-1 trading plans adopted by directors, officers and other persons (except the issuer), adding new requirements for the Rule 10b5-1(c)(1) affirmative defense and implementing new disclosure requirements for trading plans and issuer policies and procedures. These changes to the affirmative defense available under Rule 10b5-1 will impact issuers and their directors and officers, and anyone else wanting to trade under a 10b5-1 trading arrangement. The new rule effective date is February 27, 2023.

Mandatory Cooling Off Periods	• Directors and officers relying on the Rule 10b5-1(c)(1) affirmative defense may not initiate any trades under a trading plan until the later of: – 90 days following plan adoption or modification; or – the earlier of (1) two business days following the disclosure in a Form 10-Q or Form 10-K (Form 20-F or Form 6-K for foreign private issuers) of the issuer's financial results for the fiscal quarter in which the plan was adopted or modified; and (2) 120 days following plan adoption or modification. • Persons other than directors or officers are subject to a shorter cooling off period of 30 days. This shorter period will apply to non-officer employees, for example, who wish to benefit from the affirmative defense when trading. "Officer" for these purposes means an officer subject to the filing requirements of Section 16 under the Exchange Act. • The amendments do not impose any cooling off period on issuers for share repurchases executed through a trading plan, although the SEC said it will continue to consider this topic. • Any changes to the amount, price or timing of the purchases or sales of securities under an existing plan (or changes that impact amount, pricing and timing under plans governed by an algorithm, computer program or formula) will be deemed to be a termination of the existing plan and will trigger a new cooling off period.

New Certification Requirement	• Directors and officers must include a representation in their Rule 10b5-1 plan certifying that, at the time of the adoption of a new or modified plan: (1) they are not aware of material nonpublic information (MNPI) 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 the Exchange Act or Rule 10b-5.
Restrictions on Overlapping and Single Trade Plans	The amendments provide that the affirmative defense under Rule 10b5-1(c)(1) is generally not available for (1) multiple overlapping 10b5-1 plans for any class of securities (not just the class of securities being traded under a particular plan) or (2) more than one single-trade Rule 10b5-1 trading plan during any consecutive 12-month period. Again, these restrictions do not apply to issuers. There are a few exceptions to these restrictions: • separate plans with different broker-dealers or other agents may be treated as a single Rule 10b5-1 plan so long as, when taken as a whole, the separate contracts comply with all of the rule's requirements, including that a modification of one contract acts as a modification of each other contract under the plan; • an insider may maintain two separate plans at the same time if trades under the later-commencing plan are only authorized to begin after all trades under the first plan end or the first plan terminates; • an insider may have overlapping plans solely to sell securities as necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, otherwise known as "sell-to-cover" transactions. Note that this exception applies only to tax withholding obligations and does not encompass the payment of option or other derivative exercise prices; and • The restrictions on overlapping plans will not apply to purchases and sales through employee stock purchase plans and dividend reinvestment plans, since these purchases and sales occur directly with the issuer.
New Public Disclosure Requirements for Issuers	• Item 408 of Regulation S-K will now require quarterly disclosure on Forms 10-Q and 10-K (Form 20-F for foreign issuers) for the adoption, termination and material terms of a 10b5-1 trading plan or other pre-planned trading arrangement (including arrangements that do not seek to benefit from the affirmative defense) by an issuer's directors and officers (but not the issuer). – The "material terms" of a plan include the date of adoption or termination of a plan, its duration and the aggregate amount of securities to be purchased or sold, but not the price or pricing formula at which trades may be executed under the plan. – The disclosure must indicate whether the plan or arrangement is intended to qualify as a 10b5-1 plan. – Any modification of a plan or arrangement that constitutes a termination must also be disclosed. • Issuers, including foreign private issuers, must annually report on whether the issuer has adopted insider trading policies and procedures applicable to directors, officers, employees and the issuer itself. Issuers must file those policies and procedures as exhibits to the annual report on Form 10-K or Form 20-F. If the policies are contained in an issuer's code of ethics and the code of ethics is included as an exhibit, the filing of the code will satisfy the requirement. If an issuer does not have insider trading policies or procedures, it must explain why.

Additional Disclosure Requirements	• Item 402 of Regulation S-K will now require issuers to disclose their policies and practices regarding grants of stock options, stock appreciation rights, or similar awards, and provide tabular disclosure of every such award granted to a named executive officer within four business days before and one business day after the filing of a periodic report or the filing or furnishing of a Current Report on Form 8-K that contains MNPI and the percentage change in the market value of the securities underlying the award between those dates. This disclosure must be tagged using inline XBRL. • Forms 4 and 5 filers will contain a new checkbox for filers to indicate that a reported transaction was intended to satisfy the affirmative defense conditions of the Rule 10b5-1(c). • Form 4 will also be modified to require that bona fide gifts of equity securities must be reported on Form 4 within two business days after the execution of the transaction, rather than being permitted to be filed on a Form 5 after the end of a fiscal year.
What Should Issuers Do Now?	• Educate directors, officers and employees on the new rules. • Adopt new procedures to address the restrictions on overlapping and single trade plans. • Consider the impact of the new requirements to publicly disclose trading plans. • Review and consider amending insider trading plans and procedures in anticipation of public disclosure. • Consider early adoption of cooling off periods. • Review timing of equity grants versus the filing of periodic reports and consider implementing new procedures. • Review and revise any forms of trading plans to add the certification requirement and cooling off periods.

The final rules 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. The final amendments defer by six months the date of compliance with the additional disclosure requirements for smaller reporting companies. If a plan is already in effect on the effective date of the new rules, it will be grandfathered and will not be required to comply with the new rules; however, if the pre-existing plan is amended in any way that would constitute a “termination” of such plan under the new rules, then the amended plan will have to comply with the new rules.

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