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Ringling in the New Year – Practical Tips for Public Companies to Implement the New SEC Rule 10b5-1 Trading Plan Rules in Their Internal Policies and Procedures



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On December 14, 2022, the U.S. Securities and Exchange Commission (“SEC”) unanimously adopted final rules adding new conditions applicable to Rule 10b5-1 trading plans and requiring disclosure of the adoption, modification or termination of Rule 10b5-1 trading plans by directors and officers of public companies. In addition, the new rules require disclosure of option grant practices and insider trading policies and procedures of public companies and amend disclosure requirements for option grants to named executive officers close in time to an issuer’s disclosure of material nonpublic information. Finally, the new rules amend Forms 4 and 5 to require reporting persons to identify transactions made pursuant to a Rule 10b5-1 trading plan and disclose all gifts of equity securities on Form 4.^[1]

The final rules go into effect 60 days after their date of publication in the Federal Register (February 27, 2023). After such date, any new or amended Rule 10b5-1 trading plan must comply with the requirements of the final rules. Existing 10b5-1 trading plans will be grandfathered in, and the new conditions of Rule 10b5-1(c) will not apply to such plans. However, any subsequent termination of such a plan will need to be disclosed, and any amendment to such a plan to change the amount, price or timing of transactions under the plan after the effective date will be treated as the adoption of a new plan and will need to comply with the final rules. The amendments to Forms 4 and 5 will go into effect with reports filed on or after April 1, 2023. Public companies are required to comply with the disclosure requirements regarding Rule 10b5-1 trading plans described below in periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statement starting with the first filing that covers the first full fiscal period that begins on or after April 1, 2023 (*i.e.*, for calendar year companies), the second quarter 2023 Form 10-Q (for the adoption, modification or termination of programs) and the fiscal 2023 Form 10-K/20-F filed in early 2024 (for the filing of the programs as an exhibit). In addition, public companies are required to comply with the disclosure

requirements regarding their insider trading policies and procedures in periodic reports on Forms 10-K and 20-F that cover the first full fiscal period that begins on or after April 1, 2023. Smaller reporting companies have an additional six-month phase-in period and are required to comply with the disclosure requirements described below in periodic reports on Forms 10-Q, 10-K and 20-F and in any proxy or information statement starting with the first filing that covers the first full fiscal period that begins on or after October 1, 2023.

The final SEC adopting release is available [here](#) and the SEC fact sheet is available [here](#).

Practical Tips on How to Revise Public Company Internal Policies and Procedures to Comply with the New Rule 10b5-1 Trading Plan Rules

As public companies kick off fiscal year 2023 and begin a typical annual review of their internal policies and procedures, we recommend that the following documents be reviewed carefully for compliance with the new rules.

Rule 10b5-1 Trading Plan Templates – Add the new cooling-off period and certification requirements:

- For officers and directors, add a cooling-off period that no trades can be initiated until the later of: (1) 90 days after adopting the plan and (2) two business days after the release of final results on Form 10-Q or 10-K for the fiscal quarter in which the plan was adopted (but not to exceed 120 days after adoption).
- For persons other than directors and officers or the issuer (e.g., non-officer employees), add a 30-day cooling-off period.
- For directors and officers, add a certification that at the time of adoption of the Rule 10b5-1 plan: (1) they were not aware of material nonpublic information and (2) they adopted the plan in good faith and not as part of a plan or scheme to evade Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5.

Disclosure Controls and Procedures Documentation – Add provisions to the disclosure controls and procedures documentation regarding the following items:

- 10b5-1 Trading Plan Information – Add provisions to disclosure controls and procedures such that information regarding the adoption, termination and modification of material terms of a Rule 10b5-1 trading plan or non-Rule 10b5-1 trading arrangement is appropriately collected at the end of the close process each quarter from the relevant legal or compliance team and communicated to the public company reporting team responsible for preparing the Form 10-Q and Form 10-K. A non-Rule 10b5-1 trading arrangement is defined in Item 408(c) of Regulation S-K and includes certain pre-planned trading arrangements that do not meet the conditions of the Rule 10b5-1(c)(1) affirmative defense (for example, trading arrangements that were entered into before the new rules became effective and did not observe the applicable cooling-off period).
- Disclosure Requirements for Insider Trading Policies and Procedures – Disclosure of whether an issuer has insider trading policies and procedures

regarding the purchase or sale of issuer securities by directors, officers, employees or the issuer will now be required, and any such policies or procedures must also be filed as an exhibit to annual reports on Form 10-K (on Form 20-F for foreign private issuers). Accordingly, such policies should be carefully reviewed and updated as needed before they are publicly filed.

- **Disclosure on Timing of Option Awards Close in Time to the Release of Material Nonpublic Information** – In addition, specific disclosure of the issuer’s policies and practices on the timing of option (or stock appreciation right or similar) awards in relation to the disclosure of material nonpublic information will be required, and issuers will be required to provide detailed disclosure of such grants made to named executive officers within four days preceding or one day after filing of a 10-Q, 10-K or certain 8-Ks. Accordingly, issuers will need to carefully monitor and consider the timing of any such awards which might be viewed as part of a problematic “spring-loading” or “bullet-dodging” grant practice.

Employee Benefit Plans – Confirm that such plans are compliant with the new certification requirements, cooling-off periods, and limitations on single-trade plans and overlapping plans.

Insider Trading Policies – Review such policies to confirm that they align with the new SEC rules. These policies often contain provisions that parallel requirements in the securities laws. For example, restrictions around cooling-off periods and certifications may need to be updated or added to align with the new rule. A requirement should also be added for directors and officers to notify the issuer when they adopt, modify or terminate a 10b5-1 plan.

Director and Officer Questionnaires – Consider adding a requirement for directors and officers to provide confirmation that all 10b5-1 plans have been reported to the issuer over the past fiscal year.

Form 4 Filing Procedures – Modify existing Section 16 reporting procedures to include new provisions that gifts by insiders will need to be reported within two business days on Form 4 (rather than being eligible for delayed reporting on Form 5, as was previously the case). Confirm that all Form 4 filings after April 1, 2023 include the mandatory check box that will indicate whether a trade was made pursuant to a plan that is intended to satisfy Rule 10b5-1(c).

[1] The final amendments will require registrants to tag the information specified by new Items 402(x), 408(a), and 408(b)(1) of Regulation S-K, and new Item 16J(a) of Form 20-F, in Inline XBRL in accordance with Rule 405 and the EDGAR Filer Manual.
