



SEC Adds New Conditions for Rule 10b5-1 Trading Plans

Includes New Disclosure Obligations on Reporting Companies

Jan 31, 2023

Categories:
[Publications](#)

Authors:
[Alan K. MacDonald](#)

On December 14, 2022, the SEC adopted amendments to Rule 10b5-1, adding new conditions to the affirmative defense to insider trading that enables directors and officers to purchase and sell shares under the terms of a pre-existing, binding trading plans during periods when they may be aware of material nonpublic information. The amendments also impose new requirements on public companies to disclose additional information quarterly about the use of trading plans by their directors and officers to purchase and sell company shares. Public companies must also file their insider trading compliance policies and procedures as an exhibit to the Form 10-K annual report.

Amended Rule 10b5-1 takes effect on February 27, 2023, and compliance with its provisions will be required at various dates beginning on April 1, 2023.

Background

The Commission adopted Rule 10b5-1^[1] in 2000 to address a divergence among federal appellate courts on the issue of what, if any, connection must be shown between a trader's possession of material nonpublic information and his or her trading to establish liability as a "manipulative or deceptive device[s] or contrivance[s]" prohibited by Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.^[2] Rule 10b5-1 provides that a purchase or sale of an issuer's security is on the basis of material nonpublic information if a person was aware of the material nonpublic information when the person made the purchase or sale.

In addition, Rule 10b5-1 established an affirmative defense to liability for insider trading. It provides that trading was not made on the basis of material nonpublic information if the person can

demonstrate, among other things, that the trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan for the trading of securities adopted at a time that the person was not aware of material nonpublic information.

Since the adoption of the affirmative defense, courts, legislators and commentators have expressed concern that the liability protections have fostered new strategies for opportunistic trading of securities on the basis of material nonpublic information. Academic studies have also found that corporate insiders trading pursuant to Rule 10b5-1 plans consistently outperform the trading of corporate insiders that is not conducted under such plans.^[3]

The SEC responded to these concerns by amending Rule 10b5-1 to implement additional conditions that must be met for the affirmative defense and to impose new disclosure requirements that will provide investors more information to better assess how directors and officers with access to material nonpublic information about public companies use trading plans to purchase and sell shares of their companies' shares.

Cooling-Off Periods

The amendments impose "cooling-off periods" before trading under a newly adopted Rule 10b5-1 plan can commence.

A director or officer^[4] will not be able to rely on the Rule 10b5-1 affirmative defense unless the plan provides that trading under the plan will not begin until the later of (1) 90 days after the adoption of the Rule 10b5-1 plan or (2) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the plan was adopted.^[5] A cooling-off period of 30 days applies to persons other than the issuer's directors and officers.^[6] No cooling-off period applies to an issuer repurchasing its own shares under the terms of a 10b5-1 plan.

Any modification to the terms of a Rule 10b5-1 plan that changes the amount, price, or timing of the purchase or sale of the securities (including a modification or change to a written formula or

algorithm, or computer program that affects those terms) constitutes the termination of the original plan, and the adoption of a new plan, triggering a new cooling-off period.^[7]

Director and Officer Certifications

The Rule 10b5-1 affirmative defense is only available if a trading plan was entered into in good faith and not as part of a plan or scheme to evade the prohibitions of the rule. The amendments also add a condition that all persons entering into a Rule 10b5-1 plan must act in good faith with respect to the plan. The purpose is to discourage opportunistic trading and deter insiders from improperly influencing the timing of corporate disclosures to benefit their trades under such a plan.^[8]

The amendments further provide that directors and officers must include representations in their plans certifying at the time of the adoption of a new or modified Rule 10b5-1 plan that: (1) they are not aware of any 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.

The certification condition is meant to reinforce directors' and officers' cognizance of their obligation not to trade or enter into a trading plan while aware of material nonpublic information, that it is their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5-1 plans, and that the affirmative defense 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.^[9]

Restricting Multiple Overlapping Rule 10b5-1 Trading Arrangements

The Rule 10b5-1 affirmative defense has not been available if a trader hedges planned transactions by taking offsetting financial positions.

A strategy that has been available until now is the use of multiple overlapping trading arrangements in ways that could allow material nonpublic information to factor into the trading decision. An insider

can set up trades through several overlapping trading arrangements timed to occur around dates on which he or she anticipates the issuer will likely release material nonpublic information (such as earnings releases). The insider then selectively cancels trades or terminates plans on the basis of material nonpublic information before the information is publicly disclosed.

The amendments restrict the use of more than one Rule 10b5-1 trading plan to prevent the selective alteration or cancellation of plans to achieve a particular trading outcome when an insider is aware of material nonpublic information.

A series of separate contracts with different brokers or other agents acting on behalf of the same person to execute trades may qualify as a single "plan," as long as the contracts with each broker or agent, when taken together as a whole, meet and remain collectively subject to all of the applicable conditions of the affirmative defense. However, the modification of any one contract will be a modification of every other contract or instruction comprising the single unified plan, thereby constituting the adoption of a new unified plan and triggering a cooling-off period.

The Rule allows the substitution of one broker or agent executing trades on behalf of the insider pursuant to the Rule 10b5-1 plan for a different broker or agent as long as the purchase or sales instructions applicable to the substituted broker or agent are identical, including with respect to the price, timing, and amount of securities to be purchased or sold. An insider will not lose the benefit of the affirmative defense if the insider closes a securities account with one financial institution and transfers the securities to a different financial institution as long as the price, timing, and amount of securities to be purchased or sold under the plan do not change.

A person may also maintain two separate Rule 10b5-1 plans 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. However, persons adopting successive plans must consider the required cooling-off period of any successor plan if the initial trades under the successor plan are to have the benefit of the affirmative

defense.

Another exception covers employee compensation plan transactions that are structured as Rule 10b5-1 plans, such as sales of securities used to generate funds to cover the withholding taxes associated with equity vesting and elections under 401(k) plans or employee stock purchase plans ("sell-to-cover transactions").

The insider will not lose the benefit of the affirmative defense with respect to two concurrent Rule 10b5-1 plans, so long as one of the plans authorizes only qualified sell-to-cover transactions. A plan authorizing sell-to-cover transactions only qualifies when the plan authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations, and the insider does not otherwise exercise control over the timing of such sales.

The exception does not allow an insider to maintain a separate plan covering sell-to-cover transactions incident to the exercise of stock options. Option exercises occur at the discretion of the option holder, presenting an opportunity for an insider to exercise options after obtaining material nonpublic information. However, a single Rule 10b5-1 plan could include instructions authorizing a designated agent to sell sufficient securities to cover any tax withholding obligations incident to an option exercise along with instructions to sell based on other financial variables. Modifications to such a plan unrelated to option exercises could trigger a new cooling-off period, and any sell-to-cover transactions would not have the benefit of the affirmative defense during the cooling-off period.

The multiple plan exception would also apply to acquisitions of shares through employee stock ownership plans and dividend reinvestment plans because these transactions are directly with the issuer, and therefore are less likely to give rise to insider trading concerns.

Restricting Single-Trade Arrangements

The amendments limit the ability to rely on the affirmative defense to one single-trade plan per twelve-month period for all persons other than issuers. The proposed limitation was intended to balance

accommodating the use of single-trade plans for one-time liquidity needs against the potential for abuse of such plans.

The limitation responds to concerns that trades under single-trade plans may provide particularly profitable opportunities for insiders to trade while aware of material nonpublic information, amplified by a recent study that found that trades under a single-trade plan avoid losses that appear statistically unlikely to be avoided by uninformed traders.^[10]

Disclosure Requirements

For the first time issuers will be required to disclose information about the specific trading arrangements used by their directors and officers. The objective of more robust disclosure is to highlight particular trading arrangements and deter potential abuses.^[11]

For most filers, the new disclosures must be included in the annual or quarterly report that covers the first full fiscal period that begins on or after April 1, 2023. For smaller reporting companies, the new disclosures must be included in the annual or quarterly report that covers the first full fiscal period that begins on or after October 1, 2023.

New Item 408(a) of Regulation S-K

The following information required by new Item 408(a) must be disclosed for each fiscal quarter.^[12]

- Whether any director or officer adopted or terminated any trading arrangement intended to satisfy the affirmative defense conditions of Rule 10b5-1, including any modification that constitutes the termination of an existing trading arrangement and the adoption of a new trading arrangement;
- Whether any director or officer adopted or terminated any written “non-Rule 10b5-1 trading arrangement;”
- A description of the material terms of any written trading arrangement *other than* terms with respect to the prices at which trades are authorized to be executed. The description must indicate whether it is a Rule 10b5-1 trading arrangement

or non-Rule 10b5-1 trading arrangement and should include such terms as:

- The name and title of the director or officer;
- The date of adoption or termination of the trading arrangement;
- The duration of the trading arrangement; and
- The aggregate number of securities to be sold or purchased under the trading arrangement.

A “non-Rule 10b5-1 trading arrangement” must be adopted at a time when the director or officer was not aware of material nonpublic information, must provide fix the terms or a formula as to the pricing and timing of trades, and cannot permit the director or officer to exercise any subsequent influence over how, when, or whether to effect purchases or sales. Since there is no intent to qualify for the affirmative defense, the director or officer would not have to comply with other conditions such as restrictions on the use of multiple plans and single trade plans. However, the non-Rule 10b5-1 trading arrangement would remain subject to the disclosure requirements, which should serve to deter abuse.

Disclosure of Insider Trading Policies and Procedures

Issuers will now be required to file their policies and procedures designed to promote compliance with insider trading laws, rules, and regulations, and any applicable listing standards as an exhibit to the annual report on Form 10-K. Therefore issuers should review and refresh their insider trading policies in light of the new requirements before they are filed with the next 10-K.

Short-Swing Trading Reports; Gifting Considerations

Insiders that report on Forms 4 or 5 will be required to check a box to indicate that a reported transaction was “intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)” and to disclose the date of adoption of the trading plan.

In addition, bona fide gifts of securities that were previously permitted to be reported voluntarily on Form 4 or once a year on

Form 5 will now be required to be reported on Form 4 by the end of the second business day after the gift transaction.

Reporting persons will be required to comply with the new reporting requirements for beneficial ownership reports filed on or after April 1, 2023. In particular, accelerated gift reporting will require companies to educate their directors and executive officers about the impending changes and revise their insider trading policies to require that these insiders promptly report their gifting activity to the company.

In its Adopting Release, the SEC noted that donors can use material nonpublic information to time gifts in order to maximize their own charitable deduction.^[13] Making gifts of securities while aware of material nonpublic information or with the knowledge that the donee will sell the securities prior to the disclosure of such information may also be actionable as insider trading.^[14] Accordingly, companies should consider permitting insiders to make gifts of company securities only during periods when trading company securities is permitted.

In addition, insiders who make annual gifts of securities may consider adopting 10b5-1 trading plans to be sure that they can make their gifts regardless of any subsequent undisclosed material developments about their companies.

Disclosure Regarding Options Grants Made Close in Time to the Release of Material Nonpublic Information

Timing option grants to occur immediately before the release of positive material nonpublic information (“spring-loading”) or after the release of adverse material information (“bullet-dodging”) can benefit the recipients by making it more likely that options will be in-the-money or not underwater shortly after being awarded.

The final rules require narrative and tabular disclosure of issuers’ policies and practices around the timing of options grants and the release of material nonpublic information in its annual report or proxy statement.^[15]

A new compensation table must present any options awarded beginning four business days before the filing of an annual or quarterly report or the filing or furnishing of a current report that discloses material nonpublic information, including earnings information, and ending one business day after a triggering event. A current report filed only to disclose a material new option award grant does not trigger the additional compensation disclosure.

For more information, please contact any attorney with Frost Brown Todd's Securities & Corporate Governance practice group.

[1] 17 C.F.R § 240.10b5-1.

[2] *Insider Trading Arrangements and Related Disclosures*, SEC Rel. No. 33-11138 (Dec. 14, 2022) ("Adopting Release"); see also *Selective Disclosure and Insider Trading*, SEC Rel. No. 33-7881 (Aug. 15, 2000).

[3] See, e.g., Alan D. Jagolinzer, *SEC Rule 10b5-1 and Insiders' Strategic Trade*, 55 Mgmt. Sci. 224 (2009) M. Todd Henderson et al., *Offensive Disclosure: How Voluntary Disclosure Can Increase Returns from Insider Trading*, 103 GEO. L.J. 1275 (2015); Taylan Mavruk & H. Nejat Seyhun, *Do SEC's 10b5-1 Safe Harbor Rules Need to Be Rewritten?*, 2016 Colum. Bus. L. Rev. 133 (2016); Artur Hugon & Yen-Jung Lee, *SEC Rule 10b5-1 Plans and Strategic Trade Around Earnings Announcements*, (2016),

<https://ssrn.com/abstract=2880878>; David Larcker et al., *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, Stan. Closer Look Series (Jan. 2021) ("Gaming the System").

[4] Persons deemed "officers" for purposes of Rule 10b5-1 are officers who have significant policy-making functions who would generally qualify as "executive officers." 17 C.F.R. §§ 240.10b5-1(c)(1)(ii)(C), 240.16a-1(f).

[5] An earnings release filed or furnished on Form 8-K does not qualify. Adopting Release At 30.

[6] The shorter period recognizes "meaningful delays in their ability to liquidate a stock position may cause some financial strain particularly for employees who may lack the resources and access to alternative liquidity sources available to directors and officers." Adopting Release at 35.

[\[7\]](#) Modifications that do not change the sales or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions under a Rule 10b5-1 plan (such as an adjustment for stock splits or a change in account information) will not trigger a new cooling-off period.

[\[8\]](#) Adopting Release at 66.

[\[9\]](#) Adopting Release at 42. The Adopting Release also reiterates that certification does not establish an independent basis of liability for directors or officers under Section 10(b) and Rule 10b-5. *Id.* at 46.

[\[10\]](#) Gaming the System, *supra* note 3 (noting from their analysis of a sample of sales transactions made pursuant to Rule 10b5-1 plans between Jan. 2016 and May 2020 that trades occurring within 30 days of adoption of a Rule 10b5-1 plan are approximately 50 percent larger than trades made six or more months later).

[\[11\]](#) Adopting Release at 68-69.

[\[12\]](#) The information is provided in Part II, Item 5(c) of the Quarterly Report on Form 10-Q and Part II, Item 9B of the Annual Report on Form 10-K.

[\[13\]](#) New subsection (x) of Item 402 of Regulation S-K.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.