



Securities Law ADVISORY ■

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SEC Requires Additional Disclosure for Insider Transactions and Trading Programs

SEC Adoption of Amendments to Rule 10b5-1 and Insider Trading Rules

On December 14, 2022, the Securities and Exchange Commission (SEC) adopted amendments to Rule 10b5-1 and the insider trading rules, which had been proposed earlier in the year.

The SEC's amendments:

- Add new conditions to the availability of the affirmative defense for Rule 10b5-1 plans, including cooling-off periods for officers and directors and others (but not issuers).
- Require additional disclosure of insider trading policies and the adoption, modification and termination of Rule 10b5-1 plans by issuers, officers, and directors.
- Create new disclosure requirements relating to the timing of certain equity awards for executive and director compensation and updated Forms 4 and 5.

Rule 10b5-1 Plans

The amendments to Rule 10b5-1 add new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1), including:

- A mandatory cooling-off period for officers and directors of the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in periodic reports on Form 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).
- A mandatory cooling-off period of 30 days for persons other than issuers or directors and officers.

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- Requiring officers and directors to provide certification in their 10b5-1 plan that they are unaware of material nonpublic information about the issuer at the time they adopted or modified a Rule 10b5-1 trading arrangement and that the trading arrangement was made in good faith.
- A limitation on multiple overlapping Rule 10b5-1 trading arrangements for anyone other than issuers.
- A limitation on the availability of the affirmative defense for a single-trade plan to one plan during any 12-month period for anyone other than issuers.
- A requirement that all persons entering into a Rule 10b5-1 plan must act in good faith.

New Disclosure Requirements

The rule amendments create new disclosure requirements related to insider trading policies; the adoption of Rule 10b5-1 plans by issuers, officers, and directors; and Section 16 filings, including:

- Requiring issuers to disclose in their quarterly reports on Form 10-Q or annual report on Form 10-K whether, during the period, the issuer, or any officer or director, adopted or terminated a Rule 10b5-1 trading plan.
- Requiring issuers to disclose in their annual reports and proxy statements whether they have adopted insider trading policies and (i) if not, explain why they have not and (ii) if so, file the policy as an exhibit to the annual report.
- Requiring certain tabular and narrative disclosures of option awards granted shortly before or after the release of material nonpublic information.
- XBRL tagging of required disclosures.
- Updating Forms 4 and 5 to require filers to indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).
- Requiring gifts to be reported on Form 4 within two business days.

Changes from the Proposed Rules

Cooling-off periods will NOT apply to issuers. The mandatory cooling-off period has been shortened from the proposed minimum of 120 days to no more than 120 days for directors and officers.

How to Prepare to Comply with Amended Rules

When will the rules become effective?

The amendments will become effective 60 days from the date of publishing 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 (other than smaller reporting companies) will be required to comply with the new disclosure requirements in the first periodic report, proxy, or information statement that covers the first full fiscal period that begins on or after April 1, 2023.
- Smaller reporting companies have an additional six months before being required to comply with the new amendments.

What should you do now to prepare?

To best prepare for the new rules, issuers should review:

- Insider trading policies and amend as necessary to ensure compliance with the new rules.
- Insider trading programs and policies with a view toward the new disclosure requirements for the insider trading programs and establish new policies and procedures for the use of Rule 10b5-1 plans by insiders.
- Company disclosure controls and procedures in preparation for the additional disclosure required under the new rules.

SEC Reopens Comment Period for Proposed Amendments to the Share Repurchase Disclosure Rules Due to the Passage of the Inflation Reduction Act

On December 7, 2022, the SEC reopened the comment period for the proposed amendments to the rules governing issuers' disclosure of repurchases or buybacks of their equity securities due to the enactment of the Inflation Reduction Act of 2022.

If these rules are ultimately adopted, issuers will likely need to make further adjustments to insider trading policies and programs in addition to those necessitated by the new Rule 10b5-1 and insider trading rules highlighted above.

New Form SR requiring next-day reporting

- Issuers would be required to disclose any purchase made by or on behalf of the issuers or an affiliated purchaser of shares or units of any class of the issuer's equity securities registered under Section 12 of the Exchange Act.
- Issuers would be required to file a new Form SR by the end of the first business day following the day the issuer executes the share repurchase.
- The new Form SR would require the tabular disclosure of the:
 - Date of the repurchase.
 - Identification of the class of securities purchased.
 - Total number of shares or units purchased (including all issuer repurchases whether made pursuant to publicly announced plans or programs).

- Average price paid per share or unit.
- Aggregate total number of shares or units purchased on the open market.
- Aggregate total number of shares or units purchased in reliance on the safe harbor in Rule 10b-18.
- Aggregate total number of shares purchased pursuant to a plan intended to satisfy the defense conditions of Rule 10b5-1(c).

Heightened periodic disclosures of repurchases on Form 10-K, Form 10-Q, Form 20-F and Form N-CSR

- Issuers would be required to disclose:
 - The objective or rationale for their share repurchases and process or criteria used to determine the amount of repurchases.
 - Any policies or procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction on such transactions.
 - Whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and if so, the date the plan was adopted or terminated.
 - Whether repurchases were made in reliance on the Rule 10b-18 nonexclusive safe harbor.
- Additionally, issuers would be required to check a box indicating whether any of their officers or directors, subject to the Section 16(a) reporting requirements, purchased or sold shares or other units of the class of the issuer's equity securities that are the subject of an issuer share repurchase plan or program within 10 business days before or after the announcement of such plan or program.

Impact of the Inflation Reduction Act

Previous interested party commentary on the proposed rule amendments did not consider the impact the Inflation Reduction Act's excise tax would have on the incidence and level of share repurchases.

In light of the 1% excise tax imposed on buybacks by the Inflation Reduction Act, the SEC has reopened the comment period and added a [memorandum](#) by the Division of Economic and Risk Analysis that analyzed the impact of Section 4501 of the Internal Revenue Code of 1986, which was added by the Inflation Reduction Act, on the proposed rule's potential economic effects.

In its memorandum, the Division of Economic and Risk Analysis identified several effects of the new excise tax, including:

- The number of issuers subject to the proposed amendments would likely decrease to the extent issuers eliminate share repurchases or replace them with dividends.
- The categories of benefits described in the proposed amendments will likely remain the same, with potential changes in magnitude.

- The categories of costs described in the proposed amendments will likely remain the same, with potential changes in magnitude of fixed and variable costs.
- Issuers subject to one of the new excise tax's exceptions are not expected to be directly affected.

Next Steps

Interested parties have until January 11, 2023 (30 days from the date of publication in the *Federal Register*) to submit comments electronically or via mail.

To best prepare for the potential new rules, companies should:

- Review disclosure controls and procedures to ensure that they would be able to comply with the new Form SR filing requirements and the enhanced periodic disclosures.
- Consider policies and procedures for officers and directors selling shares while the company is in the market repurchasing securities, whether they should have any restrictions on such sales, and the impact on both issuer repurchase programs and sales by officers and directors such a policy would have on the company.

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