



Regulatory Alert

Regulatory Insights



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SEC Rule 10b5-1: Final amendments to insider trading arrangements, related disclosures

KPMG Insights. SEC's final amendments to insider trading Rule 10b5-1 (unanimously adopted) are intended to address concerns regarding the trading activities and behaviors of "corporate insiders" of public companies who have access to material non-public information. The intent is to strengthen investor protections and confidence in the securities markets. The amendments are substantially similar to those proposed late in 2021. Companies subject to SEC regulation must ensure that practices are in place to safeguard against prohibited trading activities by "corporate insiders", including directors, officers, and "persons other than directors, officers, or the issuer." Similarly, they should review and modify current policies and practices regarding insider trading, compensation, and gifts of securities, as appropriate. Enhanced scrutiny of insider trading and broader conflicts of interest compliance risk programs, controls and governance should be anticipated in the near term as the rules go into effect and the new disclosure requirements are incorporated into companies' financial and nonfinancial reports. In addition, though directed toward public companies, the rules and disclosures may also serve as a "roadmap" for other companies and government entities to update and enhance their own investment/trading policies and practices.

Concerns over trading activity based on material non-public information and other conflicts of interest have been raised in recent years in public companies, in private companies, and with respect to public officials. All entities should, therefore, look to re-review insider trading and conflicts of interest practices, with consideration given to limits and enhancing controls.

The SEC [approved](#) final amendments to Rule 10b5-1 (Rule) under the Securities Exchange Act of 1934 governing trading by "corporate insiders" on the basis of material nonpublic information (MNPI). The amendments, which are substantially similar to those proposed late in 2021 (see KPMG Regulatory Alert, [here](#)), are intended to address concerns that gaps in the Rule may allow "corporate insiders" (including directors and officers of an issuer) to trade securities "opportunistically" on the basis of MPNI in ways that could "harm investors and undermine the integrity of the securities markets."

Affirmative Defense - Rule 10b5-1(c) establishes an affirmative defense to Rule 10b-5 liability for insider trading in situations where it is evident that a trade was not made on the basis of MPNI because 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 (collectively or individually a "trading arrangement") adopted when the trader was not aware of the MNPI. This affirmative defense allows "corporate insiders" to trade securities without risk of liability by setting up a "10b5-1 trading arrangement".

Highlights of the final amendments to the Rule and disclosure requirements follow.

Final Amendments - The final rule changes amend the Rule 10b5-1(c) affirmative defense to insider trading liability to include:

- A cooling-off period for officers and directors that restricts trading under the plan to the later of i) 90 days after the adoption or modification of the Rule 10b5-1 plan, or ii) two



business days following the disclosure of the issuer’s financial results in certain periodic reports for the fiscal quarter in which the plan was adopted or modified (but in no event to exceed 120 days following plan adoption or modification). *Note:* a proposed cooling off period for issuers was not adopted.

- A cooling off period of 30 days for persons other than issuers or directors and officers before any trading can commence under the trading arrangement or modification.
- A condition to the availability of the affirmative defense that requires directors and officers to include a representation in their Rule 10b5-1 plan certifying, at the time of the adoption of a new or modified plan, that: i) they are not aware of MNPI about the issuer or its securities; and ii) 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 persons other than issuers to use multiple overlapping Rule 10b5-1 trading arrangements for purchases or sales of any class of securities of the issuer on the open market during the same period.
- A limitation on single trade plans to one plan during any consecutive 12-month period.
- A condition that requires persons entering into a Rule 10b5-1 trading arrangement to act in good faith with respect to the plan.

Final Disclosures - New disclosure requirements for Rule 10b5-1 trading arrangements and other trading arrangements entered into by companies or insiders include:

- Annual disclosure of the issuer’s insider trading policies and procedures (or if none, why).
- Quarterly disclosure of the adoption, modification, and termination of Rule 10b5-1 and certain other written trading arrangements by directors, officers, and issuers as well as the terms of those arrangements.

- A narrative disclosure of the issuer’s option grant policies and practices along with a tabular disclosure showing grants made in proximity to the issuer’s disclosure of MNPI (beginning 4 business days before a triggering event and ending one day after the triggering event) and the percentage change in the market price of the underlying securities on the trading day before and after the release of such information. *Note:* a proposed share repurchase trigger was not adopted.
- A requirement to “tag” all required disclosures to enable readability by machines and humans.
- A requirement that Forms 4 and 5 filers indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c); all bona fide gifts of securities must be disclosed on Form 4.

Compliance. The final rule amendments will become effective 60 days following publication in the Federal Register. In addition:

- 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 will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports (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.
- Smaller reporting companies (SRCs) will be required to comply with the new disclosure and tagging requirements in Exchange Act periodic reports (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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