



LEGAL ALERT

January 4, 2022

SEC PROPOSES NEW RULES RELATING TO INSIDER TRADING AND RELATED DISCLOSURES IN FORMS 10-Q, 10-K, 4 AND 5

On December 15, 2021, the SEC proposed new rules relating to Rule 10b5-1 insider trading plans as well as new mandatory disclosure and reporting requirements for public companies concerning insider trading policies and for individuals subject to reporting trades on Forms 4 and 5 ("SEC Release"). The SEC would be expected to issue final rules in 2022 and adopt an effective date which may be different for each proposal described below.

Rule 10b5-1 Plans

Rule 10b5-1 was adopted in 2000 with the aim of providing an affirmative defense to insider trading by permitting purchases and sales of securities of a company which the person who established the plan may be aware of material nonpublic information relating to the company at the time of the purchase or sale of the company's securities if, prior to such purchase or sale, the plan had been established by a written contract which (1) specified the amount of securities to be purchased or sold, including the price and date; (2) included a written formula or algorithm for determining amounts, prices and dates or (3) did not permit the person to exercise any subsequent influence over how, when or whether to effect purchases or sales. If adopted as proposed, the SEC Release would:

- Prohibit making any trades under a new or modified Rule 10b5-1 plan for 120 days in the case of officers and directors and 30 days in the case of an issuer (including an

issuer that structures a share repurchase plan as a Rule 10b5-1 trading arrangement

- Require officers and directors to certify in writing that, at the time of adoption of a Rule 10b5-1 plan, they (i) were not aware of material nonpublic information about the issuer and its securities and (ii) are adopting the plan in good faith and not as part of a plan or scheme to evade the anti-fraud provisions of the federal securities laws.
- Eliminate the affirmative defense to insider trading for any trades by a trader who has established multiple overlapping trading arrangements for open market purchases or sales of the same class of securities, except transactions where a person acquires securities directly from an issuer, such as through a DRIP, not executed by the director or officer in the open market.

New Disclosures on Forms 10-Q and 10-K

The SEC Release would require detailed quarterly disclosure on Form 10-Q of the use of Rule 10b5-1 and non-Rule 10b5-1 trading arrangements ("Trading Arrangements") by the issuer and its directors and officers for trading of the issuer's securities. However, this disclosure would not be required if, during the period covered by Form 10-Q, neither the issuer nor officers or directors of the issuer adopted or terminated a Trading Arrangement.

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Regardless of whether a company or its officers or directors have adopted a Trading Arrangement, the SEC Release also would require disclosure on Form 10-K of the issuer's insider trading policies and procedures.

New Disclosures on Forms 4 and 5

Under the SEC Release, Forms 4 and 5 would include a new checkbox where the filer would be required to indicate whether a sale or purchase reported thereon was made pursuant to a Rule-10b5-1 plan. If the box is checked, the filer would need to provide the date of adoption of the Rule-10b5-1 plan. The SEC Release also would require a Form 4 filer to report a "bona fide gift" of equity securities by the end of the second business day following the date of execution of the transaction.

New Disclosures in Compensation Discussion and Analysis

The SEC Release would require new disclosures relating to option awards to Named Executive Officers or directors that are made within a certain time proximity of the release of material nonpublic information such as an earnings announcement. Importantly, the SEC does not propose to exempt Smaller Reporting Companies from this disclosure requirement but a Smaller Reporting Company would be permitted to limit these disclosures to the Principal Executive Officer at the company's fiscal year-end and up to two additional individuals who would have been the most highly compensated but for not serving as executive officers at fiscal year-end.

If this proposal is adopted as proposed, it would require tabular disclosure of each option award meeting the above definition (including the number of securities underlying the award, the grant date, the grant date fair value and the option's exercise price) granted within 14 calendar days before or after the filing of a periodic report, an issuer share repurchase or the filing or furnishing of a current report on Form 8-K that contains material non-public information. With respect to each option award, the issuer must disclose the market price of the underlying securities the trading day before disclosure of the material nonpublic information and the market price of the underlying securities the trading day after disclosure of the material nonpublic information.

Planning Ahead

If adopted as proposed, public companies will need to incorporate mandated disclosures into their preparation of Forms 10-Q and 10-K, review their insider trading policies and procedures and adopt internal procedures relating to creation or modification of Trading Arrangements and filing of Forms 4 and 5 to ensure compliance with relevant SEC rules.

Need More Information?

For additional information or assistance, please contact any of the attorneys listed below at 717.731.1700 or by email at the addresses listed below.

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