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Client Alert Commentary

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Amended Rule 10b5-1 and New Insider Trading Disclosure: Frequently Asked Questions

Key Points

- The SEC's amendments to Rule 10b5-1 and new rules mandating insider trading disclosures take effect at the end of next month.
- The changes raise significant interpretive issues, including ambiguities stemming from multiple compliance dates:
  - **February 27, 2023** — Rule 10b5-1 and Rule 16a-3 amendments
  - **April 3, 2023** — Forms 4 and 5 checkbox and trading-plan date disclosure
  - **10-Q for Q2 2023** — Quarterly insider trading disclosures by calendar-year companies
  - **10-K and proxy statement for either 2023 (filed in 2024) or 2024 (filed in 2025)** — Annual trading policy disclosures by calendar-year companies (effective date is unclear, though many companies will likely comply using the earlier date)
- This Client Alert answers FAQs relevant to public companies and Section 16 reporting persons and includes a summary of the new rules in Annex A.

Rule 10b5-1 Compliance Dates and Transition Issues

1. **What does the February 27, 2023 effective date mean for new trading plans?**

   Trading plans adopted on or after that date must satisfy amended Rule 10b5-1 in order to benefit from its affirmative defense.

2. **What about existing trading plans? Can I keep them in place after February 27?**

   Yes. But bear in mind that an existing trading plan that is modified on or after that date to change the amount, price, or timing of trades will need to comply with amended Rule 10b5-1 in order to benefit from the affirmative defense.

3. **What if I keep my existing trading plans in place and enter into a new trading plan on or after February 27? Would the existing plans need to be terminated in order for the new plan to get the benefit of the affirmative defense under amended Rule 10b5-1?**

   In our view, in order for a new plan adopted on or after February 27 to benefit from the affirmative defense, any existing plans generally will need to be terminated unless:

   - the existing plans themselves qualify for one of the amended rule's limited exceptions for overlapping plans;[1] or
   - you keep only one pre-existing plan (other than plans within an exception for overlapping plans) and the new plan provides that trading is not authorized to begin until after all trades under the existing plan that you keep are completed or have expired without execution.[2]

4. **I have an existing sell-to-cover instruction for future RSU vesting events under the original rule, without a cooling-off period or other new conditions imposed by the amended rule. Can I adopt a new trading plan on or after February 27 that benefits from the affirmative defense under amended Rule 10b5-1 without terminating my sell-to-cover instruction?**

   Yes, if the existing sell-to-cover instruction "authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award" and you do not otherwise exercise control over the timing of the sell-to-cover sales. In that case, trades under the existing instruction would qualify as an "eligible sell-to-cover transaction" as defined in the amended rule.[3] If your prior sell-to-cover instruction satisfies that definition, you can adopt a new Rule 10b5-1 plan that benefits from the affirmative defense without needing to terminate your sell-to-cover instruction.

Cooling-Off Periods

5. **How does the "two business days" requirement in the cooling-off period work? Can my Rule 10b5-1 plan allow trading on day two or must I wait until day three?**

   In our view, trades may take place on day two because the SEC indicated that the cooling-off period expires at the beginning of the business day.

   For example, imagine that a director adopts a Rule 10b5-1 trading plan on May 1, 2023, in an open window. More than 90 but less than 120 days later, the company files its 10-Q on Monday, August 7, 2023, at 5:00 p.m. ET. In that case, the minimum cooling-off period would expire at the beginning of the second succeeding business day, with trades under the plan commencing as early as the morning of Wednesday, August 9, 2023.

   The conditions in amended Rule 10b5-1 include a cooling-off period for officers and directors that expires at least 90 days after the plan's adoption or, if later, "two business days following the disclosure of the issuer's financial results" in a 10-Q or 10-K, or in a 6-K or 20-F for foreign private issuers (FPIs), up to a maximum of 120 days after adoption. The SEC explained that it specifically rejected "a next-day approach" because that could "effectively authorize the director or officer to trade in the first minutes after that information's availability to the market," i.e., on Tuesday, August 8, 2023, in our example.[4] By contrast, as of the morning of Wednesday, August 9, 2023, the market would have had a full trading day to digest the full details of the issuer's quarterly results.

6. **Our company's insider trading policy allows our quarterly trading window to open after we release earnings but before we file our periodic report. Do we need to change our policy so that the trading window does not open until two business days after we file our periodic report, given that the director and officer cooling-off period in some cases may not expire until then?**

   No. The amendments to Rule 10b5-1 do not require any changes to companies' blackout period or trading window policies. While the new rules do impose additional conditions for persons to benefit from the affirmative defense of Rule 10b5-1, the law of insider trading has not changed. A person need not choose to establish an affirmative defense to pass muster under insider trading law. Unsurprisingly, the conditions for the affirmative defense are more demanding than the requirements for legally compliant trades. Those more-demanding conditions are the price of the flexibility Rule 10b5-1 provides "to those who would like to plan securities transactions in advance, at a time when they are not aware of material nonpublic information, and then carry out those pre-planned transactions at a later time, even if they later become aware of material nonpublic information."[5]

Affiliated Entities

7. **Can an affiliated entity of the issuer enter into a Rule 10b5-1 trading plan with no cooling-off period?**

   No. The issuer itself is not subject to a cooling-off period under amended Rule 10b5-1, but a 30-day cooling-off period applies to any person other than an issuer or a director or officer. Affiliates, such as a controlling stockholder, would not qualify as the issuer for this purpose (in contrast to other situations under the securities laws in which affiliates are lumped together with the issuer). As a result, an affiliate, such as a controlling stockholder of an issuer, would need to include a 30-day cooling-off period for a Rule 10b5-1 plan covering the issuer's securities.

8. **I am a director employed by a PE fund sponsor. What cooling-off period applies to the fund, and would its trading plan be viewed as an overlapping plan in relation to my personal Rule 10b5-1 plan?**

   The fund, as a separate person from you, generally should be subject to the 30-day cooling-off period applicable to any Rule 10b5-1 trading plan of a person other than the issuer or a director or officer, and its plan generally should not be treated as one of your own plans in determining whether you have an overlapping plan.

   However, if you have investment influence or control over the company's shares held by the fund, the fund's plan should be treated like the plan of a director or officer, subject to the longer cooling-off period of 90-120 days, the limitation against overlapping plans, and all other conditions under amended Rule 10b5-1 applicable to a director or officer.

   Alternatively, an affiliated fund could rely on the affirmative defense applicable to entities in Rule 10b5-1(c)(2). This defense remains unchanged from before and is conditioned on having investment decisions made by a person without access to material nonpublic information, without regard to any cooling-off period.[6]

9. I am a director or officer, and I want to establish a trust with its own Rule 10b5-1 trading plan. What cooling-off period applies to the trust, and would the trust's trading plan be viewed as an overlapping plan in relation to my personal Rule 10b5-1 plan?

It depends on whether you have investment influence or control over the trust. If you do, the trust's plan should be treated like the plan of a director or officer, subject to the longer cooling-off period of 90–120 days, the limitation against overlapping plans, and all other conditions under amended Rule 10b5-1 applicable to a director or officer. If you do not, then the trust should be treated like a person other than the issuer, director, or officer, thereby subject to the shorter 30-day cooling-off period and not treated as one of your own plans in determining whether you have an overlapping plan.

Overlapping Plans

10. I want to establish two trading plans that cover different time periods. Would those be considered overlapping plans?

Overlapping plans are compatible with the conditions of the affirmative defense under amended Rule 10b5-1 in three scenarios:

- You may simultaneously maintain two Rule 10b5-1 plans if one of them is a successor trading plan under which trades are not scheduled to begin until completion or expiration of the predecessor plan. If the predecessor plan is terminated early, trading under the successor plan cannot commence until the applicable cooling-off period has run from the termination date of the predecessor plan.

- You may use sell-to-cover arrangements that authorize the sale of only enough securities necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award.

- You may have several contracts with different brokers to execute trades under a single trading plan.

Otherwise, the affirmative defense under amended Rule 10b5-1 is unavailable if more than one trading arrangement exists simultaneously, even if those multiple arrangements address different time periods and therefore do not entail chronological overlap of trades.[7]

11. Does the restriction on overlapping plans apply to different classes of securities?

Yes. The amended rule's restriction on overlapping plans applies to plans for any class of securities of the issuer, not only for the same class of securities.

Good Faith Condition

12. How has the good faith condition changed under the amended rule?

The amended rule conditions the affirmative defense on having "acted in good faith with respect to" the plan. This clarifies that good faith is an ongoing and continuous condition of the amended rule, intended to broaden the original rule's condition that the plan "was given or entered into in good faith."

For example, if an employee who entered into a Rule 10b5-1 trading plan in good faith were to influence the timing of the company's disclosure of material nonpublic information in a way that would make the employee's trades under the trading plan more profitable (or less unprofitable), the employee would not be acting in good faith with respect to the plan and would not benefit from the affirmative defense under the amended rule.[8]

Registered Offerings

13. Can my company use a Rule 10b5-1 trading plan to sell securities to the public under a registration statement? For example, we have an ATM program and want to be able to sell on an uninterrupted basis.

No. Rule 10b5-1 provides an affirmative defense only to insider trading liability, whereas it offers no liability protection from Securities Act Sections 11, 12(a)(2) and 17(a), none of which would permit a company to sell securities to the public while in possession of material nonpublic information.[9]

14. What about a registered secondary sale? Could a selling security holder on a resale registration statement use Rule 10b5-1 to sell securities under the registration statement?

No. As described above, Rule 10b5-1 offers no protection against the antifraud provisions of the Securities Act in a transaction registered under that statute.

Insider Trading Disclosure Compliance Dates and Transition Issues

15. When do I have to comply with the new disclosure and XBRL tagging requirements?

The answer is a bit convoluted, so bear with us.

Under the new disclosure and XBRL tagging requirements, companies must provide:

- quarterly disclosure of any adoption, modification, or termination by directors or officers of written trading arrangements under 10b5-1 or otherwise; and
- annual disclosure regarding the company's insider trading policies and procedures, and the timing of stock option awards in relation to disclosure of material nonpublic information.

The SEC stated that companies must comply with these requirements "in the first filing that covers the first full fiscal period that begins on or after April 1, 2023" (or October 1, 2023, for smaller reporting companies). This works out differently for quarterly versus annual disclosures.

For **quarterly disclosures**, this transition period is easy to apply. For a calendar-year company, the quarterly disclosure regarding director and officer trading plans would become mandatory in the second quarter 10-Q, which is "the first filing that covers the first full fiscal period that begins on or after April 1, 2023."

For **annual disclosures**, however, the transition period is not straightforward and could generate significantly different compliance deadlines:

- Taken literally, the **first annual filing** that **covers** the **first full annual period** that begins on or after April 1, 2023, will be:

- the 10-K and proxy statement (or 20-F for an FPI) for the fiscal year ended June 30, 2024 (filed in 2024) for a company with a June 30 year-end; and

- the 10-K and proxy statement (or 20-F for an FPI) for the fiscal year ended December 31, 2024 (filed in 2025) for a company with a calendar year-end.

- Alternatively, the **first annual filing** that **includes** the **first full quarterly period** that begins on or after April 1, 2023, will be:

  - the 10-K and proxy statement (or 20-F for an FPI) for the fiscal year ended June 30, 2023 (filed in 2023) for a company with a June 30 year-end; and

  - the 10-K and proxy statement (or 20-F for an FPI) for the fiscal year ended December 31, 2023 (filed in 2024) for a company with a calendar year-end.

Absent clarifying guidance from the SEC Staff, we expect that many companies may follow the earlier compliance date for their annual disclosures. However, other companies may elect to provide the annual disclosures with their **second** 10-K and proxy statement (or 20-F for FPIs) filed after April 1, 2023, based on the longer transition period available under the literal reading of the SEC's statements on timing of transition to the new requirements.[10]

Section 16 Reporting Changes

16. When do Section 16 reporting persons have to comply with the new amendments to Forms 4 and 5?

The amendments to Forms 4 and 5 to add the Rule 10b5-1 checkbox and plan adoption date disclosure will take effect for beneficial ownership reports filed on or after Monday, April 3, 2023. The SEC said that reporting persons must comply with these amendments to Forms 4 and 5 for beneficial ownership reports filed after Saturday, April 1, 2023.[11]

17. Does the requirement to report dispositions by gift on Form 4 within two business days have the same compliance date as the amendments to Forms 4 and 5?

You might think so, but apparently not. Dispositions by gift made on or after February 27, 2023, must be disclosed on Form 4 within two business days. That is a surprising result given the April 3, 2023, transition date for the new amendments to Forms 4 and 5.

However, in addition to the Forms 4 and 5 amendments, the SEC separately amended Rule 16a-3 to accelerate the reporting of dispositive gifts before the end of the second business day following the gift. Although the SEC provided a transition period for the Forms 4 and 5 amendments, it did not specifically address the timing of the Rule 16a-3 amendments, which would therefore default to February 27, 2023, the general effective date for the new rules. Notably, the pre-existing version of Form 4 already provides the means for reporting persons to comply with the amendment to Rule 16a-3, making an amendment to Forms 4 and 5 unnecessary for this purpose.

Dispositions by gift **before** February 27, 2023, as well as any past or future acquisitions by gift, may be reported on annual Form 5.

Disclosure Issues Relating to Trading Plans

18. Must the quarterly disclosure provide the names of our directors and officers who adopt, modify, or terminate a trading plan?

Yes. The new quarterly disclosure regarding the adoption, modification, or termination of trading plans by directors or officers requires a description of each plan's material terms (other than pricing terms), including the name and title of the director or officer; the date the plan was adopted, modified, or terminated; the plan's duration; and the total amount of securities to be purchased or sold under the plan.

19. Are company plans subject to quarterly disclosure?

No, company trading plans are not subject to quarterly disclosure under these new rules, although the SEC may address company disclosures separately in the still-pending rulemaking governing share repurchase activity.[12]

20. What must companies disclose in their annual report and proxy statement?

As described in Annex A, companies must annually disclose information regarding their insider trading policies and procedures. They must also file their insider trading policies and procedures as an exhibit to their 10-K (or 20-F for FPIs).[13] The annual disclosure is required in the 10-K and annual meeting proxy statement (or 20-F for FPIs). The 10-K information is required in Part III, which can be incorporated by reference to the proxy statement disclosure.

US domestic companies also must disclose the timing of stock option awards in relation to disclosure of material nonpublic information, and they must include the new quarterly disclosure regarding the adoption or termination of plans or written trading arrangements by directors and officers during the fourth fiscal quarter. The 10-K fourth quarter information is required in Part II, which **cannot** be incorporated by reference to the proxy statement disclosure.

21. Will the quarterly disclosure requirement require companies to disclose plans adopted by directors or officers before February 27, 2023?

No. The new quarterly disclosure requirement regarding the adoption or termination of plans or written trading arrangements by directors and officers applies to quarters beginning on or after April 1, 2023. But modifications or terminations of pre-existing plans after April 1, 2023 (or after October 1, 2023, for smaller reporting companies) would require disclosure.

22. I have a pre-existing plan that qualified for the affirmative defense under the original Rule 10b5-1 even though it does not satisfy the conditions of the amended rule, and I modify the plan after April 1, 2023. In the quarterly disclosure regarding the modification of the plan, will the plan be considered a Rule 10b5-1 trading arrangement or a non-Rule 10b5-1 trading arrangement?

In our view, it depends on how you modify your plan. If the modification complies with the conditions of amended Rule 10b5-1, you should disclose it as a Rule 10b5-1 trading arrangement, because Regulation S-K Item 408(a) picks up plans intended to benefit from the affirmative defense under Rule 10b5-1. By contrast, if the modification does not comply with the conditions of the new rule, you should disclose it as a non-Rule 10b5-1 trading arrangement.

23. Can a company post its insider trading policy on its corporate website rather than filing the policy as an exhibit to the 10-K?

No. Unlike a company's code of ethics, which may be posted to its website as an alternative to exhibit filing, a company must file its insider trading policy as an exhibit to the 10-K (or 20-F for FPIs).

24. Would RSUs constitute "option-like securities" subject to disclosure under Regulation S-K Item 402(x)?

No. RSUs are not subject to Item 402(x) disclosures. Only awards of options or other similar option-like instruments are subject to Item 402(x) disclosure.

Foreign Private Issuers

25. Are there any other special considerations for FPIs as they prepare for the new requirements?

- Yes, there are a number of key points for FPIs to consider. Most importantly, since the amendments relate to plans adopted by an "officer" as defined in Exchange Act Rule 16a-1(f), FPIs will need to determine who their officers are in order for a trading plan to get the benefit of the affirmative defense under amended Rule 10b5-1.[14] FPIs are not subject to Section 16 of the Exchange Act and therefore may not have previously determined their officers under this definition, which may not correspond to their home country corporate law or governance practices.

- The cooling-off period for an FPI's officers and directors expires two business days following the disclosure of the FPI's financial results in a 6-K or 20-F, if more than 90 but less than 120 days after a plan's adoption or modification. While the SEC declined to link the end of the cooling-off period to a domestic issuer's announcement of earnings results in a Form 8-K, we believe an FPI's earnings release that is furnished on 6-K will trigger the end of the cooling-off period if it includes disclosure of the FPI's financial results, even if the FPI's earnings release contains less information than necessary to satisfy S-X Article 10 (for US GAAP filers) or IAS 34 (for IFRS filers).

- FPIs (other than MJDS Form 40-F filers) need to contend only with the new 20-F annual disclosure, filing, and XBRL tagging requirements relating to insider trading policies and procedures. Notably, they will not be required to provide the other disclosures that domestic issuers must provide, such as annual disclosure of the timing of stock option awards and the quarterly disclosure regarding the adoption, modification, or termination of trading plans by directors and officers.

- The new annual disclosure will cover an FPI's insider trading policies and procedures governing the purchase, sale, and other dispositions of its securities by directors, senior management, and employees. By contrast, domestic issuers must disclose the policies and procedures governing trading by those same parties **or the registrant itself**. The SEC stated that it added the "or the registrant itself" language to correct an inadvertent omission from the regulatory text that it originally proposed.[15] While the SEC did not make the same correction to new Item 16J of Form 20-F, we expect that many FPIs will elect to disclose any policies and procedures governing their own trading based on the SEC's stated intention to require FPIs to provide disclosure analogous to domestic issuers.

ANNEX A

Summary of Amended Rule 10b5-1 and New Insider Trading Disclosure

Rule 10b5-1 Amendments

Rule 10b5-1 under the Securities Exchange Act of 1934 provides an affirmative defense to insider trading liability for persons who trade securities under plans they adopt when they do not possess material nonpublic information and then carry out their pre-planned trades even if they later become aware of material nonpublic information. The amended rule contains new conditions that persons must satisfy to benefit from the affirmative defense.

Pre-existing plans continue to provide the affirmative defense

The SEC has acknowledged that trading plans adopted before February 27, 2023, will benefit from the affirmative defense under the original Rule 10b5-1. However, pre-existing plans that are modified on or after February 27, 2023, to change the amount, price, or timing of trades must satisfy the requirements of amended Rule 10b5-1 to benefit from the amended rule's affirmative defense.

Minimum cooling-off periods

The affirmative defense under amended Rule 10b5-1 will require plans to include a minimum cooling-off period for directors, officers, and persons other than the company. Companies are not subject to a minimum cooling-off period under the amended rule.

- **Directors and officers (90–120 days).** Directors and officers must use a cooling-off period that expires 90 days after adoption or modification of a plan or, if later, two business days after filing the Form 10-Q or Form 10-K covering the fiscal quarter in which the plan was adopted, or for FPIs, in a Form 20-F or Form 6-K that discloses the issuer's financial results.
    - In any case, this cooling-off period is subject to a maximum of 120 days.
    - For this purpose, "officers" refers to those officers that are subject to the filing requirements of Section 16 of the Exchange Act, meaning the company's executive officers plus its principal accounting officer.
- **Persons other than a director or officer (30 days).** Employees and any person other than a director or officer must use a cooling-off period of at least 30 days.
- **Companies (no cooling-off).** A company trading in its own securities need not use a cooling-off period to establish an affirmative defense under the amended rule.
- **Modifications trigger new cooling-off period.** Modifications will trigger a new cooling-off period if the modification changes the amount, price, or timing of trades, including a change to a formula that affects these inputs. Modifications do not trigger a new cooling-off period if they are immaterial or administrative, such as an adjustment for stock splits or a change in account information.

Limitation on overlapping plans

For persons other than the company, amended Rule 10b5-1 permits only one trading plan at a time, rather than multiple overlapping plans, subject to a few limited exceptions.

- **Sell-to-cover plans.** Plans that authorize sell-to-cover transactions to satisfy tax withholding obligations incident to the vesting of certain equity awards, such as grants of restricted stock and restricted stock units, will qualify for the affirmative defense of Rule 10b5-1 even if a person has another plan in place, as long as the sell-to-cover arrangement authorizes the sale of only enough securities necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award and the insider does not otherwise exercise control over the timing of such sales. This exception does not apply to sales incident to the exercise of stock options.

- **Replacement plans.** To facilitate continuous coverage of trading activity, a person may simultaneously maintain a successor trading plan under which trades are not scheduled to begin until completion or expiration of the predecessor plan. If the predecessor plan is terminated early, trading under the successor plan cannot commence until the applicable cooling-off period has run from the date of termination of the predecessor plan.

- **Multiple brokers.** Separate contracts with different brokers to execute trades under a single trading plan may be viewed together as one plan.

- **Company trading plans.** Companies may adopt multiple overlapping trading plans without regard to the limitation on overlapping plans that applies to all other persons.

Limitation on single-trade plans

For all persons other than companies, amended Rule 10b5-1 permits only one single-trade plan during any consecutive 12-month period, except for sell-to-cover arrangements.

- For this purpose, a single-trade plan is one that is "designed to effect" a trade in a single transaction, meaning that the plan "has the practical effect of requiring such a result."

- Single-trade plans do not include plans that use several different stock price triggers or that give trading discretion to a broker, even if they happen to execute in one single trade.

Insider Trading Disclosure Requirements

Companies will be required to comply with the new quarterly and annual disclosure requirements regarding insider trading "in the first filing that covers the first full fiscal period that begins on or after April 1, 2023" or that begins on or after October 1, 2023 for smaller reporting companies. The disclosure requirements are as follows:

- **Quarterly disclosure of director and officer trading arrangements.** Companies must provide quarterly disclosure for each of their directors and officers regarding:

  - any adoption, modification, or termination of Rule 10b5-1 plans or any other written trading arrangements that do not qualify for the Rule 10b5-1 affirmative defense; and

  - a description of the material terms of each plan (other than pricing terms), including the name and title of the director or officer; the date the plan was adopted, modified, or terminated; the plan's duration; and the total amount of securities to be purchased or sold under the plan.

- **Annual disclosures regarding policies for insider trading and stock option awards.** Companies must provide annual disclosure regarding their insider trading policies and the timing of stock option awards in relation to disclosure of material nonpublic information.

- **Insider trading policy disclosure.** Companies must annually disclose whether they have adopted any insider trading policies and procedures governing trading activity by directors, officers, and employees or by the company itself.
    - US domestic companies must provide this disclosure in each annual meeting proxy statement and in the annual report on Form 10-K. Incorporation by reference to the proxy statement is permitted.
    - FPIs must provide this disclosure in each annual report on Form 20-F.
- **Insider trading policy exhibit filing**. Companies must publicly file a copy of any such insider trading policy and procedures as an exhibit to their Form 10-K or 20-F.
- **Stock option grant policies and practices.** US domestic companies must include in each annual meeting proxy statement and Form 10-K information regarding the grant of stock options, stock appreciation rights, and similar option-like instruments:
    - narrative disclosure regarding their policies and practices on the timing of stock option awards in relation to the disclosure of material nonpublic information; and
    - tabular disclosure of options granted to named executive officers within four business days before, or one business day after, filing a periodic report or a current report on Form 8-K announcing material nonpublic information, including:
        - each award, including the grantee's name, the number of securities underlying the award, the date of the grant, the grant-date fair value, and the option's exercise price; and
        - the percentage change in the closing stock prices on the trading day before and immediately after the disclosure of material nonpublic information.

Section 16 reporting changes

There are two changes in Section 16 reporting requirements that take effect on different dates:

- **Form 4 reporting of gifts.** Beginning February 27, 2023, Section 16 reporting persons must report dispositions by gift on Form 4 within two business days, rather than on Form 5 after year-end. Acquisitions of gifts may still be reported on a Form 5 or voluntarily on an earlier Form 4.
- **Rule 10b5-1 checkbox.** Beginning April 3, 2023, Forms 4 and 5 will now feature a mandatory checkbox to indicate whether a reported transaction occurred under Rule 10b5-1 plan and, if so, the plan's adoption date.

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Endnotes

1 This is because paragraph (c)(1)(ii)(D) of amended Rule 10b5-1 conditions the availability of the affirmative defense on the absence of overlapping plans, with three limited exceptions. *See* FAQ 10.

2 In this circumstance, the newly adopted plan could overlap with the pre-existing plan you keep, and the new plan would fit within the exception contained in paragraph (c)(1)(ii)(D)(2) of amended Rule 10b5-1, which expressly permits one replacement plan "under which trading is not authorized to begin until after all trades under the earlier-commencing contract, instruction, or plan are completed or expired without execution."

3 Under the amended rule, a contract, instruction or plan for an "eligible sell-to-cover transaction" is not considered an overlapping plan, nor is an eligible sell-to-cover transaction itself subject to the limitation on overlapping plans. The amended Rule defines an "eligible sell-to-cover transaction" to mean a "transaction where the contract, instruction, or plan authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, such as restricted stock or stock appreciation rights, and the insider does not otherwise exercise control over the timing of such sales." Rule 10b5-1(c)(1)(ii)(D)(3). Any pre-existing contract, instruction or plan that satisfies this definition would place the sell-to-cover arrangement within the exception for overlapping plans under the new rule. In reviewing pre-existing sell-to-cover instructions, you should consider carefully whether the sale instruction covers "only such securities as are necessary to satisfy tax withholding obligations arising exclusively from vesting." It is unclear whether an existing instruction would fail to satisfy that condition and thereby lack eligibility for the overlap exception if the instruction authorizes sales that would exceed the statutory withholding rate, even though the actual tax liability arising from the vesting of an equity award may significantly exceed the statutory withholding rate. If the condition is read narrowly to permit sales only up to the statutory withholding rate, the existing instruction may be grandfathered but the new plan would not benefit from the affirmative defense unless you terminate the existing instruction.

4 The SEC explained that it rejected allowing expiration of the cooling-off period on the first business day after the filing of the periodic report to avoid extending the affirmative defense to trades that occur "in the first minutes" after filing the periodic report:

> Further, the cooling-off period for officers and directors includes a two-business day period following the disclosure of the issuer's financial results, which provides a short interval for investors and other market participants to analyze those results. Although some commenters suggested that the *next business day after results are released* would be adequate to ensure that market participants have access to the same information as the corporate insider, we have adopted a cooling-off period that extends to the second business day after results are released, as other commenters suggested. We disagree with those commenters who suggested that a next-day approach would provide all market participants with the same access as the corporate insider, as it may be challenging to obtain and analyze the full details of an issuer's quarterly results within one day. In some cases, allowing trading such a short period after release would effectively authorize the director or officer to trade *in the first minutes* after that information's availability to the market.

See Final Rule: Insider Trading Arrangements and Related Disclosures, Release No. 33-11138 (Dec. 14, 2022) [Adopting Release] at 31 (emphasis added) (citations omitted). A "next-day approach" could permit trading "in the first minutes" (i.e., at the opening bell) only if expiration would have occurred at the beginning of business day one, thereby necessitating the two-business day condition as described. It follows that expiration on the second business day occurs at the beginning of the second business day, permitting trading "in the first minutes" of the second business day. *See also id.* at 27 (explaining that, as a result

of the cooling-off period, "trading under the plan will not *begin* until . . . two business days following the disclosure of the issuer's financial results" in a periodic report or 6-K (emphasis added)).

[5] Adopting Release at 6 (citing Release No. 33-7881 at 51728 (Aug. 15, 2000)). For this purpose, we assume that your trading window will open only if (i) you have released quarterly earnings; (ii) an appropriate trading interval has elapsed so that the market has absorbed the information; and (iii) company personnel who trade are not in possession of material nonpublic information.

[6] Under Rule 10b5-1(c)(2), a person other than a natural person has the benefit of an affirmative defense if the person demonstrates that (i) the individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of material nonpublic information; and (ii) the person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making the investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information.

[7] In addition to these three scenarios, multiple plans adopted before February 27, 2023, under the original Rule may overlap. *See also* FAQs 3 and 4.

[8] *See* Adopting Release at 67.

[9] We get this question a lot, and it emerges from surprising quarters. The suggestion that a company can use Rule 10b5-1 to sell its own securities even appeared in the Proposing Release for the amendments to Rule 10b5-1. *See* Proposed Rule: Rule 10b5-1 and Insider Trading, Release No. 33-11013 (Jan. 13, 2022) at 72 ("All else equal, the proposed conditions on the use of Rule 10b5-1 plans would make it more complicated for insiders *and companies to sell* [sic] or buy shares under such plans." (emphasis added)). However, neither the original nor the amended version of Rule 10b5-1 helps with a registered trade, as to which the liability provisions of the Securities Act apply with full force.

[10] Companies that wait to provide the annual disclosures with their second 10-K should provide the quarterly disclosures with their first 10-K filed after April 1, 2023. References to "proxy statement" throughout this Client Alert also apply to information statements on Schedule 14C.

[11] Section 16 reporting persons are "required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after [Saturday,] April 1, 2023," Adopting Release at 115, resulting in a compliance date of Monday, April 3, 2023. *See* Exchange Act Rule 0-3(a).

[12] *See* Proposed Rule: Share Repurchase Disclosure Modernization, Release No. 34-93783 (Dec. 15, 2021) and Reopening of Comment Period for Share Repurchase Disclosure Modernization, Release No. 34-96458 (Dec. 7, 2022).

[13] Alternatively, companies that have not adopted insider trading policies and procedures must explain why they have not done so. Regulation S-K Item 408(b)(1); Form 20-F Item 16J(a).

[14] Exchange Act Rule 16a-1(f) defines the term "officer" as "an issuer's president, principal financial officer, or principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer."

[15] *See* Adopting Release at 84, n.250 (explaining that "the language 'or the registrant itself' was inadvertently omitted from the proposed regulatory text" and that the final rules "corrected this omission" in Regulation S-K Item 408(b)(1) without addressing the corresponding omission in Form 20-F Item 16J(a)).