

SEC Finalizes 10b5-1 Trading Plan Rule

MIKE KESNER

Summary of Key Provisions

On December 14, 2022, the Securities and Exchange Commission (SEC) released the final Rule 10b5-1 requirements for preplanned trading plans for officers, other insiders, directors, and companies to qualify for the “affirmative defense” rule for such plans (i.e., the stock transaction was not entered into based on material non-public information). The new rule applies to trading plans entered on or after February 27, 2023.

The table below summarizes the impact on 10b5-1 plans and the related disclosure requirements.

Topic	Current	Final Rule
Cooling-off Period	<ul style="list-style-type: none"> No cooling-off period In practice, many companies require a cooling-off period (e.g., 30 days) 	<ul style="list-style-type: none"> Executive Officers and Directors: Mandatory cooling-off period between plan adoption and any trade based on the later of (i) 90 days following plan adoption or (ii) the second business day following disclosure of the issuer’s financial results for the fiscal quarter in which the plan was adopted (maximum of 120 days) Other Persons: Mandatory cooling-off period of 30 days following plan adoption Amendments/modifications to an existing trading plan require the commencement of a new cooling-off period Issuers: Not subject to a cooling-off period, but the SEC is still studying the matter
Officer and Director Certification	<ul style="list-style-type: none"> Not required 	<ul style="list-style-type: none"> Officers and Directors must include a representation in the trading plan certifying that (i) they were not aware of material non-public information (MNPI) when the plan was adopted and (ii) they are adopting the program in good faith and not to evade insider trading rules
Operation of Plans in Good Faith	<ul style="list-style-type: none"> Plans must be entered in good faith to provide protection under 10b5-1 	<ul style="list-style-type: none"> Plans must also be operated in good faith by the individual and the trader to benefit from protections of 10b5-1 <ul style="list-style-type: none"> The SEC provides examples of how a plan might not be operated in good faith, such as timing the release of MNPI just prior to an upcoming trade to gain an economic advantage

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Prohibition of Overlapping Plans	<ul style="list-style-type: none"> No limit on overlapping plans 	<ul style="list-style-type: none"> Intended to prevent “gaming” multiple plans by canceling selected plans based on MNPI <ul style="list-style-type: none"> Two separate plans may exist at the same time if 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 An additional plan that covers tax withholding in connection with the vesting of equity compensation is also allowable <ul style="list-style-type: none"> Such “sell-to-cover” plans do not apply to taxes owed in connection with an option exercise, as executives control the timing of such transactions
Limit Single Trade Plans	<ul style="list-style-type: none"> No limit on single trade plans 	<ul style="list-style-type: none"> Affirmative defense available for only one single-trade plan during any 12-month period
Addition of a “10b5-1 checkbox” on Forms 4 and 5	<ul style="list-style-type: none"> Disclosure of use of 10b5-1 plans not a required part of Form 4 Some companies elect to footnote trades made under 10b5-1 plans on Form 4 	<ul style="list-style-type: none"> Checkbox for trades executed under 10b5-1 plans included on Forms 4 and 5
Disclosure of 10b5-1 Plans and other Trading Arrangements	<ul style="list-style-type: none"> The existence and details of 10b5-1 plans by insiders are not publicly transparent 	<ul style="list-style-type: none"> Quarterly disclosure of both qualified 10b5-1 and nonqualified 10b5-1 trading plans, including the following: <ul style="list-style-type: none"> Name and title of insider Date of adoption/termination Duration of plan Aggregate amount of securities eligible to be traded Termination or modification of such plans also triggers disclosure <p>Note: Stock price ranges/triggers are <i>not</i> required to be disclosed</p>
Insider Trading Policy Disclosure	<ul style="list-style-type: none"> Insider trading policies not required to be disclosed 	<ul style="list-style-type: none"> Disclosure of a company’s insider trading policy and procedures used to promote compliance in Form 10-K or 20-F
Disclosure of Stock Gifts	<ul style="list-style-type: none"> Stock gifts by insiders disclosed within 45 days on Form 5 	<ul style="list-style-type: none"> Disclosure of stock gifts by insiders within two days on Form 4

Topic	Current	Final Rule
Disclosure of Equity Award Granting Policy and MNPI	<ul style="list-style-type: none"> • Disclosure of this nature not required • Companies manage black-out periods when MNPI exists • Some companies disclose grant timing rationale and consistency in the Compensation Discussion and Analysis 	<ul style="list-style-type: none"> • Proxy disclosure of stock options, stock appreciation rights (SARs), and similar instruments made within four days before or one day after the release of MNPI (8-K, 10-Q, 10-K, or 20-F) <ul style="list-style-type: none"> — New proxy table that lists all stock options, SARs, and similar instruments, including grant date, fair market value on date of grant, and the percentage change in the closing stock price the day before and the day after the disclosure of MNPI — Required table and instructions on page four • Disclosure of grant policies and how the Compensation Committee considers MNPI when determining timing and terms of stock options, SARs, and similar instruments also required to be included in the proxy
Effective Date	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • The new affirmative defense requirements for 10b5-1 trading plans are effective for plans entered into or after February 27, 2023 <ul style="list-style-type: none"> — The final rule does not affect an existing Rule 10b5-1 plan that was entered into prior to the revised rule's effective date, except to the extent that such a plan is modified or changed after the effective date • Beneficial ownership reports (Forms 4 & 5) filed on or after April 1, 2023, must include the applicable checkboxes • Disclosure requirements applicable to Forms 10-Q, 10-K, and 20-F and in proxy statements are applicable to filings that cover the first full fiscal period that begins on or after April 1, 2023 (October 23, 2023, for Smaller Reporting Companies)

SEC Rule 10b5-1 Implications and Considerations

Executives and directors who wish to avail themselves of the affirmative defense afforded trading plans under Rule 10b5-1 may need to consider whether to adopt such a plan prior to February 27, 2023, as it would be subject to fewer restrictions and the new disclosure requirements.

Companies and their advisers may also want to revisit their policies regarding the use of 10b5-1 compliant trading plans to buy and sell company stock. Several companies encourage, but do not require, the use of 10b5-1 plans while other companies require they be used or do not have a formal policy. Given the additional restrictions to qualify, some companies may be reluctant to require the use of such plans.

It is also advisable that companies establish rigorous internal controls for collecting and reporting the adoption, modification, and cancellation of both qualified 10b5-1 and nonqualified trading plans, as both types of arrangements are subject to quarterly reporting requirements.

Finally, compensation committees will need to discuss and approve a policy regarding the granting of stock options (and other forms of equity compensation) when they are in possession of MNPI, as the policy must be disclosed in the company's proxy.

Stock Option Grant Table

As noted above, the following table is triggered by stock options, SARs, or similar instruments granted four days before or one day after the release of MNPI.

Name	Grant date	Number of securities underlying the award	Exercise price of the award (\$/Sh)	Grant date fair value of the award	Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information
(a)	(b)	(c)	(d)	(e)	(f)
PEO					
PFO					
A					
B					
C					

(A) The name of the named executive officer (column (a));

(B) On an award-by-award basis, the grant date of the option award reported in the table (column (b));

(C) On an award-by-award basis, the number of securities underlying the options (column (c));

(D) On an award-by-award basis, the per-share exercise price of the options (column (d));

(E) On an award-by-award basis, the grant date fair value of each award computed using the same methodology as used for the registrant's financial statements under generally accepted accounting principles (column (e)).

(F) For each instrument reported in column (b), disclose the percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and the trading day beginning immediately following the disclosure of material nonpublic information (column (f)).

This Viewpoint is intended to inform compensation committees, executives, and compensation professionals about developments that may affect their companies; it should not be relied on as specific company advice or as a substitute for legal, accounting, or other professional advice.

General questions about this Viewpoint can be directed to Mike Kesner (mike.kesner@paygovernance.com).