

Memorandum

New Rules Are Coming Into Effect: What Public Companies Need to Do Now to Implement the New SEC Insider Trading Rules

March 1, 2023

Recent Changes

During 2022, the Securities and Exchange Commission (the “SEC”) adopted a number of amendments to its rules relating to securities trading by public company insiders that are going into effect and will continue to be phased in over the next several months. These include:

- *New Requirements for 10b5-1 Plans.* The SEC adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”) that introduced new conditions to the use of Rule 10b5-1 as an affirmative defense against insider trading liability, including prescribed cooling-off periods, additional certifications, limitations on overlapping plans, limitations on single-trade plans and an amended good faith condition. These new conditions will apply to all 10b5-1 plans entered into or modified on or after **February 27, 2023**, other than 10b5-1 plans entered into by issuers repurchasing their own securities.
- *New Quarterly and Annual Disclosure Rules.* As part of its rulemaking related to 10b5-1 plans, the SEC adopted new disclosure rules that will, among other things, require quarterly disclosure by issuers regarding the use of 10b5-1 plans and non-Rule 10b5-1¹ arrangements by their directors and Section 16 officers and annual disclosure by issuers regarding their insider trading policies and procedures. In addition, the SEC also adopted new Item 402(x) of Regulation S-K, requiring companies to provide narrative and tabular disclosure regarding their policies and practices on timing of awards of stock options and similar instruments in relation to their disclosure of material nonpublic information. Issuers will be required to comply with the new disclosure requirements in 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** (or, in the case of smaller reporting companies, on or after **October 1, 2023**).

¹ A trading arrangement with respect to a director or Section 16 officer would be a non-Rule 10b5-1 trading arrangement where the director or officer asserts that, at a time when they were not aware of material non-public information, they (i) adopted a written arrangement of trading securities; and (ii) the trading arrangement (x) specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; (y) included a written formula or algorithm for determining the amount of securities to be purchased or sold; or (z) did not permit the covered person to exercise any subsequent influence over how, when or whether to effect purchases or sales.

- *Required Form 4 Reporting for Gifts.* The SEC updated Rule 16a-3 under the Exchange Act to require that disposition of securities by gift be reported on Form 4 within two business days of the transaction. Previously, the disposition by bona fide gift could be reported voluntarily on Form 4 or on a deferred basis on Form 5. Section 16 reporting persons will be required to report dispositions by gift on Form 4 for any gifts occurring on or after **February 27, 2023**.
- *Required Form 4 and Form 5 “Check box” for 10b5-1 Plan Transactions.* In addition, Forms 4 and 5 will be updated to include a new Rule 10b5-1(c) checkbox that filers are required to check if a reported transaction is pursuant to a plan that is intended to satisfy the affirmative defense conditions of the amended Rule 10b5-1. Filers are also required to provide the date of adoption of the 10b5-1 plan in the “Explanation of Responses” portion of the forms. 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**.
- *Requirement to Electronically File Forms 144.* Starting **April 13, 2023**, all Forms 144 must be filed electronically via the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) filing system. Prior to the rule change, Forms 144 were permitted to be submitted either electronically via EDGAR or, more commonly, in paper form by mail. As a result, the information in Forms 144 regarding sales (or potential sales) by affiliates (as defined by Rule 144(a)(1) under the Securities Act of 1933 (the “Securities Act”)) will become publicly available immediately and readily searchable. In addition, this rule change means that all affiliates wishing to sell securities issued by public companies pursuant to Rule 144 under the Securities Act will require active EDGAR filing codes if they do not already have them.

Additional information about the amendments to the SEC’s rules relating to Rule 10b5-1 and Forms 4 can be found [here](#) and information about the amendments relating to Form 144 can be found [here](#).

Actions Needed

Below are some steps that public companies should be taking to prepare for the changes discussed above:

- *Review Insider Trading Policies.* Review insider trading policies and procedures to ensure that they do not conflict with the new rules for 10b5-1 plans and that entry, modification and termination of such plans by directors and Section 16 officers is subject to appropriate issuer oversight. For example, check that any discussion of cooling-off periods, plan modifications, overlapping plans, or single-use plans included in such policies or procedures comply with the SEC’s new requirements. In addition, confirm that such policies and procedures provide timely notice to the issuer of any gift transactions undertaken by persons subject to the reporting requirements of Section 16 under the Exchange Act (*e.g.*, directors or officers) so that such transactions may be reported on a Form 4 within two business days. Consider reviewing insider trading policies for treatment of gift transactions and whether there are additional amendments to insider trading policies or procedures that would be desirable before such policies must be publicly disclosed.

- *Request Updated Forms of 10b5-1 Plans.* Brokers have amended their 10b5-1 plan forms in connection with the amendments to Rule 10b5-1 for plans entered into on or after February 27, 2023 and issuers or their counsel may wish to review these new forms in advance of the request by an officer or director to enter into such a plan.
- *Consolidate Information About Director and Officer 10b5-1 Plans and Non-Rule 10b5-1 Arrangements.* Compile information on outstanding 10b5-1 plans and non-Rule 10b5-1 arrangements entered into by directors and Section 16 officers. Request that when notifying the issuer of securities transactions, Section 16 reporting persons or their representatives indicate if a sale was conducted pursuant to a 10b5-1 plan or non-Rule 10b5-1 arrangement.
- *Educate Directors, Officers, and Impacted Employees.* Alert directors, officers, and employees who may be interested in entering into 10b5-1 plans or modifying existing plans of the SEC's new conditions for such plans and the related disclosure. Notify Section 16 reporting persons of the changes to gift reporting requirements.
- *Communicate with Affiliates.* Make affiliates aware of the new electronic filing requirement for Forms 144. Affiliates may be unaware that the forms will be publicly available on EDGAR immediately after filing. These factors may impact trading strategy. Encourage affiliates to apply for any necessary EDGAR filing codes well in advance of any potential trade and to confirm that any existing codes are active.
- *Obtain EDGAR Filing Codes Where Appropriate.* While persons subject to the Section 16 reporting requirements will already have EDGAR filing codes, a number of affiliates who have historically filed Forms 144 in paper may not have active codes. This will be particularly true of directors and officers of foreign private issuers, who are not subject to Section 16 of the Exchange Act. In addition, current or former Section 16 reporting persons who have their own codes may also wish to obtain codes for related persons in order to permit those persons to file Forms 144 independently. Assist affiliates requiring help with obtaining filing codes or recovering lost codes. The SEC has created a Form 144—[Resources for Filing Electronically](#) webpage to support Form 144 filers and filing agents in applying for access to EDGAR and in preparing and submitting the electronic Form 144.
- *Formulate a Plan for Handling Electronic Filing of Forms 144.* Discuss filing responsibilities with brokers frequently used by affiliates and encourage affiliates to have such discussions with their brokers. Historically, brokers have coordinated directly with their clients and mailed Forms 144 to the SEC on their behalf with little to no issuer review or involvement. While some brokers are preparing to electronically file Forms 144 on behalf of clients, others may not be willing to do so. This may cause some affiliates to look to the issuer for assistance. Form 144 is now a fillable form online through the EDGAR online forms management website² or may be submitted by an EDGAR filing agent. Determine to what extent the issuer will be involved in the preparation, review and/or filing of Forms 144 for affiliates prior to filing. Consider

² EDGAR online forms management website available at:
<https://www.filermanagement.edgarfiling.sec.gov/Welcome/EDGAROnlineFormsLogin.htm>

the allocation of relevant responsibilities and any necessary training. Consider any desired policies and procedures, including those related to maintenance of filing code information, advance notice, execution of forms, and restrictions on filing during trading hours.

- *Consider Adopting Option Grant Policy.* In anticipation of the disclosure requirement for option grant practices and the requirement to identify option grants made to named executive officers close in time to the release of material non-public information, issuers should analyze their historic grant timing and consider whether to adopt a formal option grant policy. Issuers may consider prohibiting option grants made at a time when they have material non-public information or within the period beginning four business days before, and ending one business day after, (i) the filing of a periodic report on Form 10-K or 10-Q or (ii) the filing/furnishing of a Form 8-K containing material non-public information. Such a policy may also establish a schedule for timing of option grants, with grant dates being set to occur during regularly scheduled open windows.

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