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New SEC Rules Regarding Insider Trading Arrangements and Related Disclosures

*The Securities and Exchange Commission (“SEC”) last month adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”),¹ and related disclosure requirements. Rule 10b5-1 generally provides an affirmative defense to insider trading liability if, subject to certain conditions, the purchase or sale of a security is made pursuant to a plan designed to qualify under Rule 10b5-1 that was adopted when the insider was **not** aware of material non-public information (“MNPI”).*

In light of the amendments, public companies should review their insider trading policies, equity grant procedures, and disclosure controls and procedures, and adjust as necessary.

RULE 10B5-1 AMENDMENTS

The changes to Rule 10b5-1 add new conditions to using 10b5-1 plans, including:

- A cooling-off period for directors and Section 16 officers of the company, before trading may commence under a new or modified² 10b5-1 plan, until the later of:
 - (i) 90 days following the adoption or modification of a 10b5-1 plan; or
 - (ii) two business days following the disclosure of the company’s financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the 10b5-1 plan was adopted or modified (but not to exceed 120 days following the adoption or modification of such plan);
- A 30-day cooling-off period for persons other than issuers, directors, or Section 16 officers of the company before trading may commence under a new or modified 10b5-1 plan;
- When adopting or modifying a 10b5-1 plan, directors and Section 16 officers of the company must include a representation in their 10b5-1 plan that, on the date of adoption or modification of such plan:
 - (i) they are not aware of any MNPI about the company or its securities; and
 - (ii) they are adopting or modifying the 10b5-1 plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1;

1. See “[Insider Trading Arrangements and Related Disclosures](#),” SEC Release No. 34-96492, Dec. 14, 2022.

2. A modification or change to the amount, price, or timing of the purchase or sale of securities underlying a 10b5-1 plan will be deemed a termination of the existing plan and adoption of a new plan. Therefore, most modifications to 10b5-1 plans will be deemed a termination of such plan and adoption of a new plan that triggers a new cooling off period and other Rule 10b5-1 conditions.

- Subject to certain exceptions, a prohibition for anyone, other than issuers, who entered into a 10b5-1 plan to:
 - (i) have multiple overlapping 10b5-1 plans; and
 - (ii) use more than one single-trade 10b5-1 plan in a 12-month period; and
- A condition that all persons entering into a 10b5-1 plan must act in good faith with respect to such plan.

The Rule 10b5-1 amendments will become effective on February 27, 2023.

DISCLOSURE REQUIREMENTS

Additionally, the SEC adopted the following new disclosure requirements:

- Directors and Section 16 officers will need to check a new box on their Forms 4 and 5 if the reported transaction was made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) under the Exchange Act³;
- Companies will need to disclose in their periodic reports whether, during the last quarter (the company's fourth fiscal quarter in the case of an annual report), any director or Section 16 officer of the company adopted, modified, or terminated any Rule 10b5-1 plan, including the name and title of the director or officer, the date on which the plan was adopted, modified, or terminated, the duration of the plan, and the aggregate number of securities to be purchased or sold pursuant to the plan (see Item 408(a) of Regulation S-K);
- Companies will need to annually disclose whether the company has adopted insider trading policies and procedures, with such policies and procedures filed as an exhibit to Form 10-K (see Item 408(b) of Regulation S-K);
- Companies will need to annually disclose their policies and practices related to the timing of awards of options in relation to the disclosure of MNPI, including how the board determines when to grant such awards, whether the board or compensation committee takes MNPI into account when determining the timing and terms of such awards, and whether the company timed the disclosure of MNPI to affect the value of executive compensation (such disclosure is not required for RSUs) (see Item 402(x)(1) of Regulation S-K); and

- Companies will need to annually disclose, in a new executive compensation table, any awards of options to named executive officers in the period beginning four business days before the filing of a Form 10-Q, Form 10-K, or Form 8-K that discloses MNPI (subject to limited exceptions) and ending one business day after the filing of such report (see Item 402(x)(2) of Regulation S-K).

Companies will be required to tag the information specified by Items 402(x), 408(a), and 408(b)(1) of Regulation S-K in Inline XBRL.

The SEC provided the following compliance dates for the new disclosure rules discussed in this alert:

- Section 16 reporting persons will be required to comply with the amendments in Forms 4 and 5 filed on or after April 1, 2023; and
- All companies (other than smaller reporting companies) will be required to comply with the new disclosure and tagging requirements in Forms 10-Q and 10-K and in any proxy statements that are required to include Item 408 and Item 402(x) disclosures in the first filing that covers the first full fiscal period that begins on or after April 1, 2023. (Smaller reporting companies are required to start complying with these requirements in the first filing that covers the first full fiscal period that begins on or after October 1, 2023.)

For more information or assistance with the new Rule amendments and disclosure requirements, contact [Yelena M. Barychev](#), [Melissa Palat Murawsky](#), [Troy Varrasse](#), or another member of Blank Rome's Corporate practice group.

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3. In addition, the SEC adopted changes to the reporting of bona fide gifts by directors and Section 16 officers. Under the amended rules, the gift of securities by a director or a Section 16 officer must now be reported on a Form 4 within two business days of the gift of securities.