

SEC Reporting & Compliance Alert

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SEC Staff Issues Guidance on Recent Rule 10b5-1 Amendments and Related Disclosure Requirements

On August 25, 2023, the staff of the U.S. Securities and Exchange Commission's (SEC's) Division of Corporation Finance issued guidance to address certain open questions on the amendments to Rule 10b5-1 and related disclosure requirements adopted by the SEC in December 2022.¹ The guidance, set forth below, explains that:

- Under Regulation S-K Item 408(a)(1), which requires companies to disclose certain trading plans adopted or terminated by directors or officers during the quarter:
 - Trading plans that expire pursuant to their terms are not required to be disclosed
 - This disclosure requirement applies to trading plans that cover any securities in which the officer or director has a pecuniary interest reportable under Section 16, provided that the officer or director has decided to adopt or terminate any such plan.
- The Rule 10b5-1(c) checkbox on Form 4 does not apply to trades made pursuant to a trading plan that was adopted prior to February 27, 2023 (*i.e.*, the effective date of the Rule 10b5-1 amendments).
- When measuring the required cooling-off period for directors and officers under Rule 10b5-1(c)(1)(ii)(B)(1)(ii) that expires two business days after the disclosure of the issuer's financial results for the quarter in which the plan was adopted, the Form 10-K or Form 10-Q filing date does not count as the first business day, regardless of whether the Form 10-K or Form 10-Q is filed pre-market or post-market. For example, if the Form 10-K or Form 10-Q is filed pre-market on a Monday, trading may commence under the plan on Thursday.
- A 401(k) plan under which open-market transactions are conducted at the direction of a 401(k) plan administrator — and not at the direction of the plan participant — to match a contribution by the participant with employer stock would not be an overlapping plan for purposes of Rule 10b5-1(c)(1)(ii)(D), even if a participant relies on Rule 10b5-1 to participate in the 401(k) plan.

¹ See our December 20, 2022, client alert "[SEC Amends Rules for Rule 10b5-1 Trading Plans and Adds New Disclosure Requirements.](#)"

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As a result of the interpretive guidance, companies should consider what, if any, changes should be made to their disclosure practices. The guidance with respect to 401(k) plans is narrow, addressing only matching contributions, and leaves open the question of whether participant instructions regarding allocations of a participant's 401(k) contributions to an issuer stock fund would also not constitute an overlapping plan for purposes of Rule 10b5-1(c)(1)(ii)(D).

The staff's interpretive guidance is reproduced below.

Compliance and Disclosure Interpretations, Regulation S-K

Section 133A. Item 408 — Insider Trading Arrangements and Policies

Question 133A.01

Question: Under Item 408(a)(1) of Regulation S-K, does the requirement to disclose plan terminations require disclosure of a plan that ends due to its expiration or completion (*e.g.*, the plan ends by its terms and without any action by an individual)?

Answer: Disclosure regarding termination of a plan is not required for a plan that ends due to its expiration or completion. [August 25, 2023]

Question 133A.02

Question: Item 408(a) of Regulation S-K requires disclosure of whether “any director or officer (as defined in § 240.16a–1(f) of this chapter)” adopted or terminated a Rule 10b5-1 trading arrangement or a non-Rule 10b5-1 trading arrangement during the fiscal quarter. Does this disclosure requirement apply to any such trading arrangement covering securities in which a director or officer has a pecuniary interest?

Answer: Item 408(a) applies to any Rule 10b5-1 trading arrangement or non-Rule 10b5-1 trading arrangement covering securities in which an officer or director has a direct or indirect pecuniary interest that is reportable under Section 16 that the officer or director has made the decision to adopt or terminate. [August 25, 2023]

Compliance and Disclosure Interpretations, Exchange Act Rules

Section 120. Manipulative and Deceptive Devices and Contrivances: Rule 10b5-1

Question 120.29

Question: Under Rule 10b5-1(c)(1)(ii)(B)(1), the required cooling-off period for directors and officers subject to Exchange Act Section 16 reporting is the later of 90 days after the adoption

of the contract, instruction, or plan or “[t]wo business days following the disclosure of the issuer’s financial results in a Form 10-Q or Form 10-K for the completed fiscal quarter in which the plan was adopted.” Does the filing date count as the first business day for the purposes of the Rule 10b5-1(c)(1)(ii)(B)(1) required cooling-off period?

Answer: No. For purposes of the cooling-off period specified in Rule 10b5-1(c)(1)(ii)(B)(1), the date of disclosure of the issuer’s financial results is the filing date of the relevant Form 10-Q or Form 10-K, and the first business day would be the next business day that follows the filing date. To determine the filing date of the relevant form, refer to Rule 13(a)(2) of Regulation S-T. For example, if the relevant form is filed on a Monday, trading may commence under the contract, instruction, or plan on Thursday (assuming no intervening Federal holidays). In addition, whether a form is filed before or after trading opens on a given day has no bearing on the calculation. [August 25, 2023]

Question 120.30

Question: Under a 401(k) plan, an issuer advances cash to the plan administrator who purchases stock in the open market to make matching grants of the issuer’s common stock to plan participants. If a participant relies on Rule 10b5-1 to participate in the 401(k) plan, would the Rule 10b5-1 affirmative defense be available to the participant for a concurrent plan for purchases or sales on the open market?

Answer: Yes. Even though participants elect how much to contribute to their individual 401(k) accounts, an open-market transaction conducted at the direction of the plan administrator, and not at the direction of the plan participant, to match a contribution by the participant with employer stock would not be an overlapping plan for purposes of Rule 10b5-1(c)(1)(ii)(D) that would disqualify a plan participant’s reliance on Rule 10b5-1 for a concurrent open market trading plan. [August 25, 2023]

Question 120.31

Question: Does the Rule 10b5-1(c) checkbox on Form 4 for securities transactions made pursuant to a Rule 10b5-1 trading plan apply to trading plans that were adopted prior to the effective date of the amendments to Rule 10b5-1?

Answer: No. The Rule 10b5-1 checkbox on Form 4 applies to transactions that are made pursuant to a contract, instruction, or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of amended Rule 10b5-1(c). See Release No. 33-11138 (Dec. 14, 2022). [August 25, 2023]

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Compliance and Disclosure Interpretations, Exchange Act Section 16 and Related Rules and Forms

Section 135. Form 4

Question 135.04

Question: Does the Rule 10b5-1(c) checkbox on Form 4 for securities transactions made pursuant to a Rule 10b5-1 trading plan apply to trading plans that were adopted prior to the effective date of the amendments to Rule 10b5-1?

Answer: No. The Rule 10b5-1 checkbox on Form 4 applies to transactions that are made pursuant to a contract, instruction, or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of amended Rule 10b5-1(c). See Release No. 33-11138 (Dec. 14, 2022). [August 25, 2023]

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