Hogan Lovells

SEC Update

December 22, 2022



This is a commercial communication from Hogan Lovells. See note below.

SEC adopts major Rule 10b5-1 amendments and disclosure requirements relating to securities transactions

On December 14, the SEC adopted long-awaited amendments to Rule 10b5-1 under the Exchange Act that add new conditions for a trading arrangement to qualify for the rule's affirmative defense against Rule 10b-5 liability for insider trading.

As part of its larger project to curb unlawful insider trading, the SEC also adopted new requirements under which issuers will be required to disclose information about directors' and officers' trading arrangements, issuers' insider trading policies and procedures, and option grants made close in time to the issuer's disclosure of material nonpublic information. In addition, the SEC amended Forms 4 and 5 filed under Exchange Act Section 16 to require reporting persons to identify transactions intended to comply with Rule 10b5-1, and amended Exchange Act Rule 16a-3 to accelerate the deadline for reporting dispositions of securities by gift.

The SEC's adopting release (No. 33-11138) describing the rule amendments can be viewed here.

The amended rules will be effective 60 days after publication of the release in the Federal Register. Transition arrangements defer compliance by issuers with the new disclosure requirements and compliance by Section 16 reporting persons with the beneficial ownership report amendments.

Rule amendments at a glance

Amended conditions of Rule 10b5-1(c)(1) affirmative defense

The SEC has amended Rule 10b5-1(c)(1)'s affirmative defense conditions to close "loopholes" under the rule that it believes have been used by some directors, officers, and issuers to trade on the basis of material nonpublic information.

Under the amended rule, a new or modified Rule 10b5-1 trading arrangement entered into by a director, an officer, or any other person except the issuer will be subject to a minimum waiting or "cooling-off" period before the first purchase or sale of securities may be executed under the arrangement. Other amendments applicable to persons other than issuers provide that, with limited exceptions, the rule's affirmative defense is not available for open-market purchases or sales under multiple overlapping plans or under more than one single-trade plan during any 12-month period.

Directors and officers entering into a Rule 10b5-1 written plan will now be required to certify by a representation in the plan documents that they are doing so in good faith and that they are not aware of material nonpublic information about the underlying security or the issuer. The amendments expand the existing requirement that a Rule 10b5-1 trading arrangement must be "given or entered into" in good faith to add the condition that the trader must act in good faith during the term of the trading arrangement.

Among noteworthy differences from the rule proposal, the SEC did not require a cooling-off period for issuer Rule 10b5-1 plans or subject issuer plans to the new limitations on multiple overlapping plans and single-trade plans.

New disclosure requirements

Amendments to Regulation S-K and Exchange Act forms impose new disclosure requirements that are intended to expose to market scrutiny information about director and officer trading arrangements and governance practices related to insider trading. The new disclosures must be tagged in Inline XBRL.

Registrants are required to provide quarterly disclosure regarding the adoption, termination, and material terms of Rule 10b5-1 and non-Rule 10b5-1 trading arrangements entered into by their directors and officers. In their annual reports, registrants are obligated to disclose whether they have adopted insider trading policies and procedures (or, if they have not done so, to explain why not) and to file the policies and procedures as an exhibit to the report.

The amendments also require registrants to include in their annual proxy statements a discussion of their policies and practices regarding the timing of awards of options and similar equity instruments in relation to the disclosure of material nonpublic information. Registrants must present tabular disclosure of any such awards made in the last fiscal year to named executive officers during any period beginning four business days before and ending one business day after an earnings announcement or disclosure of other material nonpublic information.

Section 16(a) reporting amendments

To provide investors with transaction-specific disclosures regarding sales and purchases under Rule 10b5-1 plans, the amendments require Section 16 reporting persons to indicate by checkboxes in Form 4 and Form 5 if any reported transactions occurred pursuant to trading arrangements intended to satisfy Rule 10b5-1(c)(1)'s affirmative defense conditions.

The SEC has amended Exchange Act Rule 16a-3 to deter what it sees as problematic gift transactions by accelerating reporting of dispositions of securities by gift from a filing on Form 5 due after year-end to a filing on Form 4 due within two business days after the gift is made.

Transition arrangements

Although the amended rules will be effective 60 days after publication of the adopting release in the Federal Register, compliance with most of the new rules and requirements is subject to phase-in over a longer period.

Rule 10b5-1 plans

The amended conditions to the availability of Rule 10b5-1(c)(1)'s affirmative defense will apply to any new Rule 10b5-1 trading arrangements adopted after the effective date of the amendments.

The amendments will not affect the affirmative defense available under a Rule 10b5-1 trading arrangement entered into before the effective date, unless the existing trading arrangement is modified after the effective date in a manner that would constitute the "adoption" of a new trading arrangement. Upon such a modification – consisting of a modification or change in the amount, price, or timing of the purchase or sale of the securities underlying the trading arrangement – the trader would be subject to Rule 10b5-1(c)(1)'s amended conditions.

New disclosure and information tagging requirements

Issuers will be required to comply with the new disclosure and information tagging 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).

Amended Section 16(a) reports

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."

Registrants and other persons subject to rule amendments

The amendments applicable to registrants extend to all categories of domestic companies subject to Exchange Act reporting requirements. Foreign private issuers that file annual reports on Form 20-F are also obligated to comply with the amended rules, except for the quarterly disclosure requirements, since those issuers do not file quarterly reports.

Persons other than issuers entering into Rule 10b5-1 trading arrangements must comply with Rule 10b5-1(c)(1)'s amended conditions, except for the new certification requirement, which applies only to the issuer's directors and officers, and except that directors and officers must comply with a longer mandatory cooling-off period than other persons.

For purposes of the new requirements, "officer" is defined in accordance with Rule 16a-1(f) under the Exchange Act, which is substantially similar to the standard for designating "executive officers" under Exchange Act Rule 3b-7.

Description of rule amendments

Amended conditions of Rule 10b5-1(c)(1) affirmative defense

Rule 10b5-1(c)(1) establishes an affirmative defense to liability under Rule 10b-5 if the purchase or sale of securities is made pursuant to (a) a binding contract, (b) an instruction to another person to execute the trade for the instructing person's account, or (c) a written plan. The SEC refers in its release to such a contract, instruction, or written plan as a "trading arrangement" or a "plan."

When it adopted Rule 10b5-1 in 2000, the SEC said it believed the affirmative defense would "provide appropriate flexibility 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 these pre-planned transactions at a later time, even if they later become aware of material nonpublic information." The SEC has amended the conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1) to address concerns that some issuers and corporate insiders have abused the rule to "opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets."

Mandatory cooling-off period. Rule 10b5-1(c)(1) did not formerly impose a minimum waiting period after adoption of a Rule 10b5-1 trading arrangement before the first purchase or sale of securities could be executed, although many arrangements have incorporated such "cooling-off" periods of varying durations. To address what it characterizes as "potentially abusive activity" when trades occur soon after adoption of a plan, the SEC has amended the rule to require a separation in time between the adoption date and the first trade.

As a condition to the availability of the affirmative defense, the amended rule requires (a) a minimum 90-day cooling-off period before the first transaction under Rule 10b5-1 director and officer trading arrangements and (b) a minimum 30-day cooling-off period before the first transaction under Rule 10b5-1 trading arrangements for all other persons except issuers. The SEC expects that any material nonpublic information of which such a trader might be aware when entering into a plan – contrary to a key condition of Rule 10b5-1(c)(1) – likely will become stale during the cooling-off period and thereby preclude the trader from profiting from the informational advantage when the first transaction occurs.

The cooling-off period applicable to director and officer trading arrangements could exceed 90 days under the formula specified in the rule, which defines the period as extending to the *later* of:

- 90 days after the adoption of the trading arrangement; and
- two business days following disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the completed fiscal quarter in which the trading arrangement was adopted (or, for foreign private issuers, in a Form 20-F or Form 6-K that discloses the issuer's financial results).

The *maximum* required cooling-off period is 120 days after plan adoption.

The SEC explains that it adopted this formula to deter corporate insiders from seeking to benefit from their knowledge of unreleased financial results for the quarter in which they entered into a Rule 10b5-1 trading arrangement. Further, by requiring a minimum cooling-off period of 90 days regardless of the earnings release date, the SEC is seeking to prevent improper trading by insiders aware of material nonpublic information – such as information about a major pending corporate transaction – that may be unrelated to the quarter's earnings.

The cooling-off period will begin after the "adoption" of the trading arrangement, which will include specified plan modifications. For purposes of the rule, any "modification or change in the amount, price, or timing of the purchase or sale of the securities" underlying a trading arrangement will constitute both a "termination" of the prior arrangement and the "adoption" of a new trading arrangement. A modification that merely substitutes or removes the plan broker administering the arrangement would not constitute a termination and adoption unless the modification also changes the price at which, or the date on which, purchases or sales of the securities will be executed.

The SEC adopted the shorter mandatory cooling-off period for persons other than directors and officers because such persons are less likely than directors and officers to be involved in making or overseeing corporate decisions about whether and when to disclose information, and are less likely to be aware of material nonpublic information.

The SEC did not adopt the proposed cooling-off period condition for issuer trading arrangements. The absence of such a condition will preserve the flexibility

of issuers to use multiple sequential trading plans for share repurchases to span trading blackout periods.

Limitation on multiple overlapping plans. The SEC has eliminated Rule 10b5-1(c)(1)'s affirmative defense for any director or officer who establishes multiple overlapping trading arrangements for open-market purchases or sales of securities, with the limited exceptions described below. The SEC did not adopt the proposed amendment that would have extended the limitation to issuer plans.

The amended rule's affirmative defense is not available for trades under a Rule 10b5-1 plan when the trader has another plan, or subsequently enters into an additional plan, for open-market purchases or sales of the issuer's securities – whether of the same or a different class – during the same period. The SEC indicates that the limitation is intended to preclude the use by corporate insiders of multiple overlapping plans to selectively cancel individual trades or terminate plans on the basis of material nonpublic information before the information is publicly released.

The overlapping-plans limitation does not apply to Rule 10b5-1 plan transactions in which directors, officers, or employees acquire or sell securities for themselves directly from the issuer, such as through their participation in an employee benefit plan, employee stock ownership plan, or dividend reinvestment plan, since such transactions are not executed by these participants in the open market.

In response to comments on the rule proposal, the SEC modified the limitation to permit traders to maintain additional Rule 10b5-1 plans in the following circumstances:

- *Plan authorizing only "sell-to-cover" transactions*: A director or officer may maintain another qualified Rule 10b5-1 plan that authorizes only qualified "sell-to-cover" transactions in which the agent is instructed to sell securities only in an amount necessary to satisfy tax withholding obligations at the time of vesting of an equity award – such as awards of restricted stock or stock appreciation rights, but not of options – so long as the insider does not otherwise exercise control over the timing of those sales.

  The amendment does not authorize sales under a second plan incident to the exercise of option awards because the exercise of such awards at the insider's discretion creates a risk of opportunistic trading. The SEC confirms that sell-to-cover transactions incident to option exercises may be executed under a single plan that authorizes other types of planned trades.
- *Later-commencing plan*: A trader may maintain two separate Rule 10b5-1 plans at the same time so long as 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. The SEC adopted this exception to preserve a person's ability to set up two successive Rule 10b5-1 plans for open-market trading in a way that would foreclose strategically timed trades based on material nonpublic information. The SEC has qualified the operation of this exception in a manner intended to ensure that both plans meet the cooling-off period condition, as well as the other conditions, of the affirmative defense.
- *Separate contracts involving multiple broker-dealers or other agents*: This exception is intended to permit use of multiple financial intermediaries when the plan securities are held in separate accounts with different financial institutions. The amended rule will treat as a single Rule 10b5-1 "plan" a series of separate contracts with different broker-dealers or other agents acting on behalf of a single person to execute trades under the contracts, each of which constitutes a Rule 10b5-1 plan.

  All of the contracts, taken together as a whole, must meet all of the conditions of, and remain collectively subject to, Rule 10b5-1(c)(1), including a requirement that a modification of any individual contract will act as a modification of the whole trading arrangement. A modification will not occur upon the substitution of a broker-dealer or other agent for the prior financial intermediary so long as the purchase and sales instructions are identical. The trader will thus be permitted to close a securities account with a financial institution and transfer the securities to a different financial institution without forfeiting the affirmative defense.

Limitation on single-trade plans. The SEC cites studies concluding that transactions under Rule 10b5-1 trading arrangements that cover a single trade are consistently "loss avoiding" for the traders and often precede declines in the issuer's stock price, which suggests to the SEC that the traders are executing "one-off," ad hoc trades based on material nonpublic information.

To deter this conduct, for all persons other than the issuer (which is not subject to this condition), the SEC

has limited Rule 10b5-1(c)(1)'s affirmative defense for open-market transactions under a single-trade plan to one such plan during any 12-month period. The affirmative defense would be available for a single-trade plan only if, during the prior 12-month period, the trader did not adopt another plan, which would otherwise qualify for the defense, that was "designed to effect the open-market purchase or sale of all of the securities covered by" the prior plan "in a single transaction."

The SEC explains that a plan is "designed to effect" the purchase or sale of securities in a single transaction when the plan "has the practical effect of requiring such a result." As examples of plans that would *not* have the effect of requiring a single transaction, the SEC refers to

- a plan that affords discretion to the person's agent over whether to execute the plan as a single transaction, and
- a plan that does not afford the agent such discretion, but instead provides that the agent's future acts will depend on events or data not known at the time the plan was entered into (such as when the plan instructs the agent to execute a certain volume of transactions at each of several specified future stock prices), where it is reasonably foreseeable at the time the plan was entered into that it "might" result in multiple transactions.

The amendment excepts from the single-trade limitation trades under a plan that authorizes only "sell-to-cover" transactions meeting the requirements described above, which will afford directors and officers the flexibility to meet tax withholding obligations related to the vesting of equity compensation.

Expansion of good faith condition. The Rule 10b5-1(c)(1) affirmative defense is available only if a Rule 10b5-1 trading arrangement was "entered into in good faith and not as part of a plan or scheme to evade" the rule's prohibitions. The SEC has added to the condition a requirement that the person entering into the trading arrangement "has acted in good faith" with respect to the trading arrangement, which will cover the trader's conduct during the term of the arrangement.

The SEC seeks with this amendment "to better ensure that material nonpublic information does not factor into the decision to trade" under Rule 10b5-1 plans. In the SEC's view, even if a corporate insider entered into a Rule 10b5-1 plan in good faith, the insider would not be acting in good faith with respect to the plan – and therefore would not be entitled to the rule's affirmative defense – if the insider

- materially modifies a planned trade at the insider's own direction and to the insider's own benefit based on material nonpublic information acquired after the plan was entered into, or
- while aware of material nonpublic information, directly or indirectly induces the issuer to publicly disclose the information in a manner that makes the insider's trades under the plan more profitable or less unprofitable.

In response to comments on the scope of the "good faith" requirement as it will apply to corporate insiders, the SEC clarifies that the obligation to act in good faith relates to "activities within the control of the insider." For example, according to the SEC, the issuer's cancellation of trades by an insider under a Rule 10b5-1 plan due to a possible merger or other corporate event "where such cancellations are outside the control or influence of the insider may not, by themselves, implicate the good faith condition."

Director and officer certifications. The amended rule requires a director or officer to certify on the date of the adoption of a new Rule 10b5-1 written plan that the director or officer

- is "not aware of any material nonpublic information about the security or issuer," and
- is adopting the written plan "in good faith and not as part of a plan or scheme to evade the prohibitions of" Rule 10b-5.

The director or officer also would have to provide the certification if the written plan were modified in a manner that would constitute the adoption of a new written plan, as described above. The SEC confirms that the certification would not be required if the director or officer terminates an existing Rule 10b5-1 plan and does not enter into a new or modified written plan for which the affirmative defense is sought.

Under the rule proposal, directors and officers would have been required to make the certification in a separate document presented to the issuer. In response to comments, the SEC has provided instead that the certification must be made in the form of a representation in the written plan documents.

The SEC has adopted the certification requirement to "reinforce" the "cognizance" of the certifying directors and officers of Rule 10b5-1(c)(1)'s good faith requirement and of their obligation not to adopt a trading arrangement while aware of material

nonpublic information. The SEC emphasizes that although a director or officer may consult legal counsel on the meaning of the terms "material" and "nonpublic information," the completion of the related certification would require a "fact-specific analysis" and should represent the trader's "personal determination" that the trader is not aware of material nonpublic information.

The SEC expresses the view that the certification does not constitute an independent basis of director or officer liability for insider trading under Exchange Act Section 10(b) and Rule 10b-5.

New disclosure requirements

The SEC's rulemaking has been directed at curbing unlawful insider trading conducted outside of, as well as under, Rule 10b5-1 trading arrangements.

In addition to adding new conditions to Rule 10b5-1(c)(1), the amendments aim to curb insider trading by requiring registrants to provide investors with an array of new disclosures about trading arrangements, insider trading compliance policies, and securities transactions. The SEC expects that the disclosures will enable investors to assess whether corporate insiders may have incentives to engage, or may be engaging, in securities transactions on the basis of material nonpublic information, and thereby will help to deter fraudulent conduct in violation of Exchange Act Section 10(b) and Rule 10b-5.

Quarterly reporting of Rule 10b5-1 and non-Rule 10b5-1 trading arrangements. The disclosure requirements are contained in a new Item 408 of Regulation S-K. Registrants are required to tag Item 408 information in Inline XBRL.

Item 408(a) and related form amendments require registrants to disclose, in each quarterly report on Form 10-Q and, for the fourth fiscal quarter, each annual report on Form 10-K:

- whether, during the registrant's last fiscal quarter, any director or officer adopted or terminated (a) any Rule 10b5-1 trading arrangement or (b) any other written pre-planned trading arrangement for the purchase or sale of the registrant's securities meeting specified criteria (referred to as a non-Rule 10b5-1 trading arrangement), in each case identifying the nature of the trading arrangement; and
- the material terms of the Rule 10b5-1 trading arrangement or non-Rule 10b5-1 trading arrangement – other than the prices at which trades are authorized under the arrangement – such as (i) the name and title of the director or officer, (ii) the date of adoption or termination of the trading arrangement, (iii) the duration of the trading arrangement, and (iv) the aggregate number of securities to be purchased or sold under the trading arrangement.

Any modification or change to the amount, price, or timing of the purchase or sale of the securities underlying the trading arrangement would constitute the termination of the existing trading arrangement and the adoption of a new trading arrangement.

The SEC did not adopt the proposed requirement for parallel disclosure about issuer trading arrangements.

The SEC believes that these disclosures will enable investors to assess whether and, if so, how registrants monitor trading by their insiders and how the trading arrangements are being used. The SEC observes in this regard that if a report describes the termination of a trading arrangement, the disclosure could provide investors and the SEC "with important information about the potential misuse of inside information such as, for example, if the termination occurs close in time to the release of material nonpublic information" by the registrant.

Annual disclosure of insider trading policies and procedures. Item 408(b) requires registrants to disclose annually whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of their securities by directors, officers, and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules, and regulations and any applicable listing standards, and, if they have adopted such policies and procedures, to file them as an exhibit. Any registrant that has not adopted insider trading policies and procedures is required to disclose why it has not done so.

The SEC did not adopt the part of its proposal that would have required registrants to describe their insider trading policies and procedures in the report.

Domestic registrants are required to include this disclosure in their annual reports on Form 10-K and proxy and information statements on Schedules 14A and 14C, while foreign private issuers are obligated to provide analogous disclosure in their annual reports on Form 20-F under a new Item 16J of that form.

Executive compensation disclosure regarding option grants. The SEC has amended its executive compensation rules to require registrants to provide additional information on an annual basis about

option grants and certain other equity awards under a new paragraph (x) of Regulation S-K Item 402. The SEC clarifies that the new disclosure requirements also apply to grants of stock appreciation rights and other "similar instruments," which the SEC refers to as instruments that have "option-like" features.

The SEC believes the prior rules have not provided investors with adequate information about a registrant's policies and practices regarding option awards timed to precede or follow the release of material nonpublic information. The new narrative and tabular disclosures are intended to fill this gap and, in particular, to provide investors with "a full and complete picture of any 'spring-loaded' or 'bullet-dodging' option grants during the fiscal year."

Narrative disclosure of policies and practices on timing of awards. Registrants will now be required to describe each year their policies and practices on timing of awards of options and similar instruments in relation to the disclosure of material nonpublic information. The discussion is required to address:

- how the board of directors or compensation committee determines when to grant such awards (such as whether the awards are granted on a predetermined schedule);
- whether, and, if so, how, the board of directors or compensation committee takes material nonpublic information into account when determining the timing and terms of an award; and
- whether the registrant has timed the disclosure of material nonpublic information for the purpose of affecting the value of executive compensation.

The SEC notes that if the registrant is subject to the requirement to present a Compensation Discussion and Analysis (CD&A) in its annual proxy statement, it could present this disclosure in that section of the filing.

Tabular disclosure of options grants to NEOs. The registrant is obligated to supplement the narrative discussion with tabular disclosure if in the last fiscal year (a) it awarded stock options or similar instruments (b) to a named executive officer (NEO) (c) during any period beginning four business days before and ending one business day after the filing of a periodic report on Form 10-Q or Form 10-K, or the filing or furnishing of a current report on Form 8-K, that disclosed earnings information or other material nonpublic information (other than a Form 8-K report that disclosed a material new option grant under Item 5.02(e)). The final rule does not incorporate the proposed amendment that would have included a share repurchase transaction as an event triggering this disclosure.

If tabular disclosure is required, the registrant must provide the following information concerning each such award for the NEO on an aggregated basis in the prescribed format:

- the name of the NEO;
- the grant date of the award;
- the number of securities underlying the award;
- the per-share exercise price;
- the grant date fair value of the award computed using the same methodology that was used for the registrant's financial statements under GAAP; and
- the percentage change in the market value of the underlying securities between the closing market price of the security one trading day prior to and one trading day following the disclosure of the material nonpublic information.

The SEC underscores that the purpose of this disclosure is "to highlight for investors option award grants that may be more likely than not to have been made at a time that the board of directors was aware of material nonpublic information affecting the value of the award."

Issuers are required to present the new disclosure in annual reports on Form 10-K (which may be incorporated by reference to disclosure in the annual proxy statement) and in proxy and information statements relating to director elections, shareholder approval of new compensation plans, and advisory (say-on-pay) votes to approve executive compensation.

The information specified by Item 402(x) must be tagged in Inline XBRL.

Section 16(a) reporting amendments

The SEC has extended to Section 16(a) filings its program for increased transparency about transactions made in reliance on Rule 10b5-1.

Disclosure of Rule 10b5-1(c) transactions on Forms 4 and 5. The SEC has amended Forms 4 and 5 filed pursuant to Exchange Act Section 16(a) to add a "checkbox" which the filer must check if a sale or purchase reported on the form was made pursuant to a trading arrangement intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). The filer also must disclose the date of adoption of the trading arrangement. The SEC believes that the new disclosure will help investors and the public better

discern whether Rule 10b5-1 plans are being used to engage in opportunistic trading on the basis of material nonpublic information.

The SEC did not adopt, as proposed, a second, optional checkbox in which the filer could have disclosed whether the reported transaction was made pursuant to a trading arrangement that did not satisfy Rule 10b5-1(c)'s affirmative defense conditions.

Reporting of bona fide gifts on Form 4. Before its amendment, Exchange Act Rule 16a-3 has permitted a filer to report any bona fide gift of equity securities on Form 5, which must be filed within 45 days after the end of the issuer's fiscal year in which the gift was made. The SEC says it is concerned that the deferred reporting of dispositions of equity securities by gift may allow Section 16 reporting persons "to engage in problematic practices involving gifts of equity securities," including opportunistically timing gifts of securities while aware of material nonpublic information relating to such securities or backdating the gifts to maximize the tax benefits associated with the dispositions.

To address this concern, the SEC has amended Rule 16a-3 to require any Section 16 filer making a disposition of the registrant's securities by gift to report the disposition on Form 4 before the end of the second business day following the date of execution of the transaction, thus eliminating insiders' ability to report dispositions of securities by gift on a year-end Form 5 or on an earlier, voluntary Form 4. *Acquisitions* of securities by gift may still be reported on Form 5.

The SEC reiterates the caution it expressed in the proposing release that insider trading concerns could be raised by a gift of securities by a donor who at the time of the gift is aware of material nonpublic information and who expects the donee to sell the securities before public disclosure of the information. Clarifying that dispositions of securities by bona fide gifts fall within the terms "transfer" and "sale" in Rule 10b5-1(c)(1), the SEC confirms that such gifts may be made under Rule 10b5-1 plans and benefit from the rule's affirmative defense.

Looking ahead

The final rule amendments reflect some notable modifications to the SEC's proposal. The SEC shortened the minimum cooling-off period for director and officer trading arrangements from 120 days to 90 days, imposed a shorter cooling-off period for other traders except the issuer, and provided limited exceptions to the new restrictions on multiple overlapping plans and single-trade plans. The final disclosure amendments do not require disclosure of the pricing terms of director and officer plans and pare back the circumstances that would trigger the tabular presentation of options grant information.

The SEC acknowledges that the final amendments nevertheless could reduce Rule 10b5-1's appeal to some corporate insiders. As the SEC also notes, however, traders choosing not to rely on Rule 10b5-1(c)(1) in purchasing or selling securities may incur other costs. These include their inability to have transactions executed during trading blackout periods, additional costs to determine whether proposed trades may be conducted in compliance with the federal securities laws and SEC rules, and a potential increase in legal liability risk.

The rule amendments will expose the operation of important compliance policies and procedures, as well as related corporate governance practices, to regulatory and investor scrutiny. The SEC intends its disclosure reforms to motivate issuers to take measures to preclude securities transactions that could be seen as allowing their insiders to profit from material nonpublic information. The amendment requiring registrants to disclose whether they have adopted insider trading policies and procedures prohibiting such transactions, for example, can be expected to impel some registrants to adopt such policies and procedures if they have not previously done so.

The amended rules elicit disclosures about the timing and substance of securities transactions that may draw negative attention from investors and the SEC. Accordingly, any preparation for compliance with the new disclosure requirements should be undertaken together with a wide-ranging review of the adequacy of corporate policies and practices that are designed to promote lawful trading activity.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

Contributors



Alan L. Dye (co-editor)
Partner, Washington, D.C.
T +1 202 637 5737
alan.dye@hoganlovells.com



Richard Parrino (co-editor)
Partner, Washington, D.C.
T +1 202 637 5530
richard.parrino@hoganlovells.com



John B. Beckman
Partner, Washington, D.C.
T +1 202 637 5464
john.beckman@hoganlovells.com



Kevin K. Greenslade
Partner, Northern Virginia
T +1 703 610 6189
kevin.greenslade@hoganlovells.com



Michael E. McTiernan
Partner, Washington, D.C.
T +1 202 637 5684
michael.mctiernan@hoganlovells.com



Tiffany Posil
Partner, Washington, D.C.
T +1 202 637 3663
tiffany.posil@hoganlovells.com



Abigail C. Smith
Partner, Washington, D.C.
T +1 202 637 4880
abigail.smith@hoganlovells.com

Additional contacts

Steven J. Abrams
Partner, Philadelphia
T +1 267 675 4671
steve.abrams@hoganlovells.com

Richard Aftanas
Partner, New York
T +1 212 918 3267
richard.aftanas@hoganlovells.com

Tifarah Roberts Allen
Partner, Washington, D.C.
T +1 202 637 5427
tifarah.allen@hoganlovells.com

Jessica A. Bisignano
Partner, Philadelphia
T +1 267 675 4643
jessica.bisignano@hoganlovells.com

David W. Bonser
Partner, Washington, D.C.
T +1 202 637 5868
david.bonser@hoganlovells.com

Glenn C. Campbell
Partner, Baltimore, Washington, D.C.
T +1 410 659 2709 (Baltimore)
T +1 202 637 5622 (Washington, D.C.)
glenn.campbell@hoganlovells.com

David Crandall
Partner, Denver
T +1 303 454 2449
david.crandall@hoganlovells.com

John P. Duke
Partner, Philadelphia, New York
T +1 267 675 4616 (Philadelphia)
T +1 212 918 5616 (New York)
john.duke@hoganlovells.com

Allen Hicks
Partner, Washington, D.C.
T +1 202 637 6420
allen.hicks@hoganlovells.com

Paul Hilton
Senior Counsel, Denver, New York
T +1 303 454 2414 (Denver)
T +1 212 918 3514 (New York)
paul.hilton@hoganlovells.com

Eve N. Howard
Partner, Washington, D.C.
T +1 202 637 5627
eve.howard@hoganlovells.com

William I. Intner
Partner, Baltimore
T +1 410 659 2778
william.intner@hoganlovells.com

Bob Juelke
Partner, Philadelphia
T +1 267 675 4615
bob.juelke@hoganlovells.com

Paul D. Manca
Partner, Washington, D.C.
T +1 202 637 5821
paul.manca@hoganlovells.com

Brian C. O'Fahey
Partner, Washington, D.C.
T +1 202 637 6541
brian.ofahey@hoganlovells.com

Leslie (Les) B. Reese, III
Partner, Washington, D.C.
T +1 202 637 5542
leslie.reese@hoganlovells.com

Richard Schaberg
Partner, Washington, D.C., New York
T +1 202 637 5671 (Washington, D.C.)
T +1 212 918 3000 (New York)
richard.schaberg@hoganlovells.com

Michael J. Silver
Partner, New York, Baltimore
T +1 212 918 8235 (New York)
T +1 410 659 2741 (Baltimore)
michael.silver@hoganlovells.com

Andrew S. Zahn
Partner, Washington, D.C.
T +1 202 637 3658
andrew.zahn@hoganlovells.com

J. Nicholas Hoover
Counsel, Baltimore
T +1 410 659 2790
nick.hoover@hoganlovells.com

Stephen M. Nicolai
Counsel, Philadelphia
T +1 267 675 4642
stephen.nicolai@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Berlin**
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta *
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.

*Our associated offices
**Legal Services Center

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www. hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2022. All rights reserved. 06826