



Regulatory Alert

Regulatory Insights



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Insider Trading and Share Repurchases

To address concerns regarding the trading activities and behaviors of corporate insiders with access to non-public material information, the SEC is proposing changes to Rule 10b5-1 as well as new disclosure requirements. Companies subject to SEC regulation must ensure that practices are in place to safeguard against prohibited trading activities by corporate insiders. Companies should also be proactive in evaluating how the proposals may impact their current policies and practices regarding insider trading, compensation, and gifts of securities. Enhanced scrutiny of insider trading and supervisory compliance programs should also be anticipated.

The SEC released proposed [amendments](#) to Rule 10b5-1 under the Securities Exchange Act of 1934 which governs trading “on the basis of” material nonpublic information in insider trading cases. The proposed amendments are intended to address concerns that gaps in the Rule may allow corporate insiders (directors and officers of an issuer) to trade securities on the basis of material nonpublic information in ways that could “harm investors and undermine the integrity of the securities markets.”

Affirmative Defense – Rule 10b5-1(c) establishes an affirmative defense to Rule 10b5-1 liability for insider trading in situations where it is evident that a trade was not made on the basis of material nonpublic information because the trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person’s account, or a written plan (collectively or individually a “trading arrangement”) adopted when the trader was not aware of material nonpublic information. This affirmative defense allows corporate insiders to trade securities without risk of liability by setting up a “10b5-1 trading arrangement”.

Proposal – To address what the SEC states is “the prevalence of trading practices by corporate insiders and issuers that suggest the misuse of material nonpublic

information,” the SEC is proposing amendments to Rule 10b5-1 that would:

- Establish a mandatory 120-day cooling-off period before trading can commence for officers and directors that enter into a new or modified trading arrangement; companies trading in their own securities would be subject to a 30-day cooling off period.
- Require officers and directors to certify that they are not in possession of, or aware of, material non-public information about the issuer or the security when adopting or modifying a trading arrangement.
- Provide that the affirmative defense under Rule 10b5-1(c)(1) does not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities.
- Provide that Rule 10b5-1 trading arrangements to execute a single trade are limited to one plan during any 12-month period.
- Require all trading arrangements to be entered into and operated in good faith.

Disclosures – The SEC is also proposing to introduce disclosure requirements for Rule 10b5-1 trading



arrangements and other trading arrangements entered into by companies or insiders. The proposed disclosures relate to:

- Annual disclosure of the issuer’s insider trading policies and procedures (or if none, why).
- Quarterly disclosure of the adoption, modification, and termination of Rule 10b5-1 and certain other trading arrangements by directors, officers, and issuers as well as the terms of those arrangements.
- Annual disclosure of the issuer’s option grant policies and practices, along with a tabular disclosure showing grants made in proximity to the issuer’s disclosure of material nonpublic information (within 14 days) and the market price of the underlying securities on the trading day before and after the release of such information.
- Reporting by corporate insiders subject to the requirements of Exchange Act Section 16 to identify transactions made pursuant to a Rule 10b5-1(c)(1) trading arrangement, and to disclose all bona fide gifts of securities.

Share Repurchase Disclosure Proposal

In a separate but related [release](#), the SEC proposed amendments to its disclosure rules regarding repurchases of issuer’s equity securities, often referred to as buybacks, that are registered under Section 12 of the Securities Exchange Act of 1934. Such disclosures apply to both open market and private transactions and are included in the issuer’s periodic reports. The proposed changes to the disclosure requirements would include:

- The objective or rationale for its share repurchases and process or criteria used to determine the amount of repurchases.

- Any policies and procedures relating to purchases and sales of the issuer’s securities by its directors and officers during a repurchase program, including any restrictions on such transactions.
- Whether it made repurchases pursuant to a trading arrangement that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), and if so, the date the arrangement was adopted or terminated.
- Whether purchases were made in reliance on the Rule 10b-18 non-exclusive safe harbor.
- Disclosure of the aggregate total number of shares purchased on the open market, the aggregate total number of shares purchased in reliance on the safe harbor in Rule 10b-18, and the aggregate total number of shares purchased pursuant to a trading arrangement that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).

See below for more information on the proposed amendments:

- [SEC Proposed Rule – Rule 10b5-1 and Insider Trading](#)
- [SEC Fact Sheet – Rule 10b5-1 and Insider Trading](#)
- [SEC Proposed Rule – Share Repurchase Disclosure Modernization](#)
- [SEC Fact Sheet – Share Repurchase Disclosure Modernization](#)

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