December 2021

SEC Proposes New Rules that Would Require Greater Disclosure of Insider Trading Plans, Stock Option Grants, Share Buybacks and More

New amendments proposed by the SEC should alert companies to review or adopt organizational policies and procedures to ensure they meet current best practices. This alert summarizes significant conditions of the proposed rules.

On December 15, 2021, the United States (U.S.) Securities and Exchange Commission (SEC) announced proposed amendments to the disclosure requirements and investor protections concerning insiders trading in company stock. The proposed rules would add new conditions to insider trading plans under SEC Rule 10b5-1 and create new disclosure requirements, including disclosure of a company's insider trading policies. Separately, the SEC proposed another rule addressing company share buyback plans to require earlier and more detailed disclosures of such purchases.

Rule 10b5-1 Trading Plans

A written trading plan under Rule 10b5-1 provides corporate insiders, including directors and officers, with an affirmative defense against insider trading liability. The plan must be established in good faith, at a time when the individual is unaware of material nonpublic information (MNPI) and can be a useful defense if the trades made pursuant to the plan are executed at a time when the individual is aware of MNPI.

The proposed amendments to Rule 10b5-1 would add new conditions to the affirmative defense against insider trading liability, including:

- **Time between plan adoption and the first trade**. The proposal would require a "cooling-off" period of 120 days for a director or Section 16 officer before any trading could take place after the trading plan is adopted or modified. However, plans entered into by companies to buy or sell their own stock will have a 30-day "cooling-off" period.

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- **Required officer or director certification.** An insider would have to certify, at the time of the adoption or modification of a Rule 10b5-1 trading plan, that they are not aware of MNPI. The certification would require retention by the officer or director for ten years.

- **No overlapping 10b5-1 plans.** The proposal would eliminate the affirmative defense if there are multiple overlapping 10b5-1 trading arrangements.

- **Impact on single trade plans under 10b5-1.** The proposal would limit the availability of the affirmative defense for a trading arrangement designed for a single trade to once in any 12-month period.

- **Requirement that 10b5-1 plan be operated in good faith.** The proposal makes clear that the affirmative defense under Rule 10b5-1 is only available if the plan is operated in good faith. In particular, the defense against insider trading would not be available to an insider that uses their influence over the timing of corporate disclosures to make a trade more profitable or to avoid or reduce a loss.

Many of these provisions have been adopted as best practices for the implementation of Rule 10b5-1 plans. Aon believes that the provision that will have the biggest impact going forward is the longer cooling off period, as most Rule 10b5-1 plans provide for 30 days. We also note that the SEC has asked whether the prohibition against overlapping 10b5-1 plans would impact tax withholding transactions with respect to equity compensation arrangements, such as stock options and restricted stock units.

Company Stock Buybacks

The SEC also proposed changes to its rules regarding disclosures around company share repurchases, more commonly known as stock “buybacks.”

Under current rules, companies are required to disclose information about their share repurchases on a quarterly basis, which reflect aggregated monthly data. The new proposal would mandate that issuers provide information about share repurchases on a new SEC Issuer Share Repurchase Report (Form SR) on the first business day after a trade is executed. The new form would include information about the total number of shares purchased and the average price paid per share.

The proposal would also add new narrative disclosure requirements in periodic reports on Forms 10-Q and 10-K, including disclosure of the objective, rationale for such repurchases, and any policies and procedures, governing officer, and director purchases or sales of a company during a repurchase.

Other Key Disclosure Requirements

- **Quarterly reporting of trading arrangements.** Form 10-Q or Form 10-K would need to disclose whether an officer, director or the company adopted, modified or terminated any written plan for the purchase or sale of the company’s securities, including plans that are not designed to satisfy Rule 10b5-1 in the prior quarter. The disclosure must also provide the plan’s terms, including its duration, aggregate number of securities subject to the plan and a description of any modification, as well as specific information regarding plan changes or termination.

- **Disclosure of insider trading policies and procedures.** The company's Form 10-K (or Form 20-F for foreign filers) would need to disclose whether it has adopted insider trading policies and procedures concerning the purchase, sale or other disposition of the company's securities by its directors, officers and employees. The company would then be required to disclose those policies and procedures. Conversely, a company would also need to explain why it did not adopt insider trading policies and procedures.

- **New proxy table for certain option grants and narrative disclosure of option grant policies.** The proposal would add a new executive compensation table showing stock option awards made to directors or officers within 14 days before or after the filing of a Form 10-Q or 10-K, an issuer share repurchase or the filing of a Form 8-K that contains MNPI and the market price of the underlying stock on the trading day before and after the release of that information. The proposal would also require narrative disclosure of a company's option grant practices with specific information regarding how the board determines the timing of option grants and how the board or compensation committee takes MNPI into account when making option grants. This disclosure is intended to provide shareholders with a full and complete picture of any spring-loaded or bullet-dodging option grants made during the fiscal year (see our recent article on 'spring-loaded' stock awards). These disclosures would also apply to smaller reporting companies and emerging growth companies, which are generally subject to less extensive executive compensation disclosure requirements than other reporting companies.

- **SEC Form 4 and 5 changes.** The proposal would require that Section 16 officers and directors check a box on the SEC Forms 4 and 5 as to whether a transaction was made under a Rule 10b5-1 trading plan. Insiders would also have to report gifts of company stock at the same time as sales, within two business days, which is significantly earlier than the current requirements to file by Form 5 within 45 days after the end of the year.

Next Steps

Both proposed rules are subject to public comment for 45 days. The request for comment that the SEC included with the proposals asks many specific questions. Interested parties should review these questions contained within the proposed rules and consider providing feedback to the SEC on the proposals. This is the first set of rule proposals in some time that has received support from all of the SEC commissioners. Therefore, we expect the rule (perhaps with some modifications) to be adopted rather swiftly over the coming year.

There are no SEC rules or regulations requiring that public companies have insider trading policies. However, given the SEC's continued focus in this area, companies would be wise to carefully review their insider trading policies and procedures, or adopt such policies and procedures if they do not yet exist. Businesses may also want to review their insiders' 10b5-1 trading plans and company policies to prepare for the changes in the final rule. In addition, companies should review their option grant practices to ensure they meet best practices.

If you have questions about this topic or other corporate governance-related matters, please contact one of the authors or write to humancapital@aon.com.

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