

SEC Releases New and Updated Guidance on Amended Rule 10b5-1

August 29, 2023

On August 25, 2023, the staff of the Division of Corporation Finance of the Securities and Exchange Commission released several new and updated Compliance & Disclosure Interpretations (“C&DIs”) regarding amended Rule 10b5-1 and related reporting requirements. In [December 2022](#), the SEC adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934, as amended, and new disclosure requirements relating to trading activity of corporate insiders and trading policies of issuers.

The C&DIs address the calculation of the mandatory cooling-off period for directors and Section 16 officers, overlapping plans involving 401(k) plans, the new Form 4 check box and disclosures about the adoption and termination of trading arrangements. The full text of the new C&DIs is attached.

CALCULATION OF THE COOLING-OFF PERIOD UNDER RULE 10B5-1

- Under Rule 10b5-1(c)(1)(ii)(B)(1), directors and Section 16 officers are subject to a cooling-off period before the date on which trading under a plan may commence, extending to the later of: (i) 90 days after the adoption or modification of a Rule 10b5-1 trading plan; and (ii) two business days following the disclosure of the issuer’s financial results in a Form 10-Q or Form 10-K (or Form 20-F or Form 6-K for foreign private issuers) for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following adoption or modification of the plan).
- The staff clarifies that the filing date does not count as the first business day for the purposes of the Rule 10b5-1(c)(1)(ii)(B)(1), but rather that “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, the staff refers registrants to Rule 13(a)(2) of Regulation S-T, which provides that the date of filing is the business day on which the filing is received if filed prior to 5:30 p.m. Eastern Time. In addition, whether a form is filed before or after trading opens on a given day does not affect the calculation. ([C&DI 120.29](#))

OVERLAPPING PLANS UNDER RULE 10b5-1

- C&DI 120.30 discusses a fact pattern in which a 401(k) plan administrator uses issuer cash advances to purchase stock in the open market to make matching grants to plan participants in circumstances where purchases are made at the direction of the plan administrator, and not the plan participant. The staff advises that this arrangement would not be considered 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. ([C&DI 120.30](#))

FORM 4 CHECK BOX FOR TRANSACTIONS PURSUANT TO RULE 10b5-1(C) PLANS

- The staff clarifies that the Rule 10b5-1(c) check box on Form 4 does not apply to trading plans that were adopted prior to the effective date of the amendments to Rule 10b5-1 (i.e., prior to February 27, 2023) ("grandfathered plans"). The check box only 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)." ([C&DI 120.31](#)) This C&DI is repeated as [C&DI 135.04](#) under Form 4 of the Section 16 C&DIs.
- Issuers may nonetheless choose to disclose in the footnotes of a Form 4 that purchases or sales were pursuant to such a "grandfathered plan."

REGULATION S-K ITEM 408 — INSIDER TRADING ARRANGEMENTS AND POLICIES

- Item 408(a) of Regulation S-K requires disclosure of whether any Section 16 officer or director adopted or terminated a Rule 10b5-1 trading arrangement or non-Rule 10b5-1 trading arrangement during the fiscal quarter in the applicable Form 10-K or Form 10-Q.
- The staff confirms that Item 408(a)(1) does not require disclosure of the termination of a plan that ends due to its expiration or completion. ([C&DI 133A.01](#))
- The staff also clarifies that Item 408(a) applies to any trading arrangement covering securities in which the officer or director has a direct or indirect pecuniary interest reportable under Section 16 that the officer or director has made the decision to adopt or terminate. ([C&DI 133A.02](#))

We are available to discuss these updates and other considerations related to Rule 10b5-1 plans. Please do not hesitate to contact us with any questions.



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NEW AND UPDATED C&DIS:**C&DI 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]

C&DI 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]

C&DI 120.31

Question: Does the Rule 10b5-1(c) check box 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 check box 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]

C&DI 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]

C&DI 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]