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Corp Fin Issues Five More Rule 10b5-1 CDIs



Last Friday, Corp Fin issued five new 10b5-1 plan CDIs – three under the Exchange Act Rules and two under Regulation S-K – to provide welcome clarifications for a variety of situations, ranging from the new Form 4 checkbox, cooling-off period calculations, overlapping plans that deal with 401(k) plans, and what to disclose about trading arrangements adoption and termination. This is the second set of 10b5-1 plan CDIs since the SEC adopted new rules – the [first set](#) was issued back in May.

Here are the three new Exchange Act Rules CDIs:

- [Question 120.29](#): 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](#): 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**: 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]

Here are the two new Regulation S-K CDIs:

- **Question 133A.01**: 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**: 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]

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