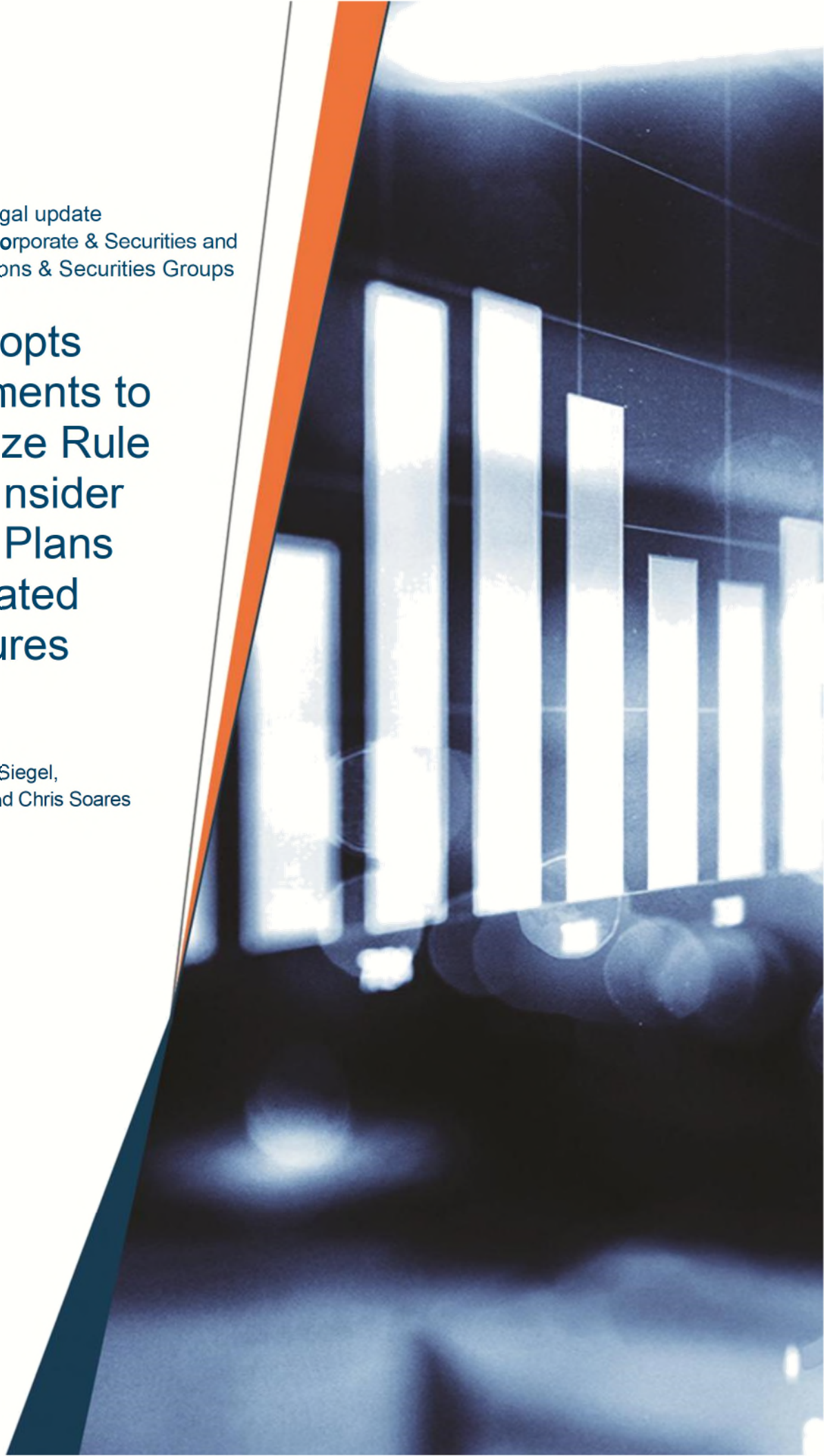


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SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures

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Key Takeaways

- New conditions to the availability of the affirmative defense under the Rule 10b5-1(c)(1), including a cooling-off period before trading can begin for directors, officers, and other persons (other than issuers)
- New certification and disclosure requirements regarding issuers' insider trading policies and regarding the adoption and termination (including modification) of Rule 10b5-1 and certain other trading arrangements by directors and officers
- New disclosure requirements for executive and director compensation regarding certain equity compensation awards made close in time to the issuer's disclosure of material nonpublic information
- Updates to Forms 4 and 5 to require Section 16 insiders to identify transactions made pursuant to a Rule 10b5-1(c)(1) trading arrangement and to disclose all gifts of securities on Form 4

The U.S. Securities and Exchange Commission on December 14, 2022, unanimously [adopted amendments](#) to Rule 10b5-1 (the "Final Rules") under the Securities Exchange Act of 1934 (the "Exchange Act") and new disclosure requirements related to investor protections against insider trading. The Final Rules differ in certain respects from the [rules proposed by the SEC](#) on December 15, 2021, as described below.

Rule 10b5-1

Rule 10b5-1 under the Exchange Act provides directors, officers and issuers with an affirmative defense to Rule 10b5 insider trading charges for trades 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, subject to several conditions.¹

The basic concept behind the Rule 10b5-1 affirmative defense is simple: if an insider has no control over the stock sales and purchases (either because an external trading manager is used or because transactions occur according to a pre-determined formula), material non-public information cannot have been the basis for the transactions, and therefore no insider trading was committed. Similarly, to the extent a securities fraud class action points to a

* Updated January 4, 2023.

1 For a Rule 10b5-1 plan to qualify, the plan must contain the following basic concepts: (1) specify the amount, price and dates of purchases or sales, (2) include a formula, algorithm or computer program for determining the amount, price and dates, or (3) prohibit the insider from exercising control over the plan while prohibiting those controlling the plan from having material nonpublic information. The plan must also have been entered into in good faith and not as part of a scheme to circumvent the insider trading rules, and a plan can only be adopted and revised at a time when the insider does not have material non-public information. Furthermore, there are restrictions on an insider's ability to engage in hedging transactions.

defendant's purportedly "suspicious" stock trades in an attempt to raise a strong inference of scienter, a defendant may attempt to rebut such an inference by arguing that the trades were made pursuant to a Rule 10b5-1 plan.

In response to "concerns about abuse of 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,"² the Final Rules add a number of conditions to the availability of the affirmative defense under Rule 10b5-1 and add a number of disclosure obligations.

Cooling-Off Condition

Previously, Rule 10b5-1(c)(1) did not impose any waiting period between the date a trading arrangement is adopted and the date of the first transaction to be executed under the trading arrangement. To "reduce the risk that an insider could benefit from any material nonpublic information of which they may have been aware at the time of adopting the trading arrangement," the Final Rules amend Rule 10b5-1(c)(1) to add, as a condition to the availability of the affirmative defense, a cooling-off period for directors and officers until the later of (1) 90 days following plan adoption or modification or (2) two business days following the filing of the applicable periodic reports³ for the fiscal quarter that discloses the issuer's financial results in which the plan was adopted (but, in any event, this required cooling-off period need not exceed 120 days following plan adoption or modification). Persons other than directors or officers (such as employees) must comply with a 30-day cooling-off period but there is no cooling-off period required for issuers.⁴ The cooling-off period applies to the adoption of a plan and also to the modification of a plan that changes the amount, price or timing of the purchase or sale of the securities under the plan.⁵

Certification Condition

To "reinforce directors' and officers' cognizance of their obligation not to trade or enter into a trading plan while aware of material nonpublic information about the issuer or its securities, that it is their responsibility to determine whether they are aware of material nonpublic information when adopting Rule 10b5-1 plans, and that the affirmative defense under Rule 10b5-1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws," the Final Rules amend Rule 10b5-1 to provide that if a director or officer of the issuer of the securities adopts a Rule 10b5-1 trading arrangement, as a condition to the availability of the affirmative defense, such director or officer would be required to include a representation in the plan certifying that at the time of the adoption of a new or modified Rule 10b5-1 plan:

- n That they are not aware of material nonpublic information about the issuer or its securities; and

2 The proposed rules referenced academic studies purporting to show that "corporate insiders trading pursuant to Rule 10b5-1 consistently outperform trading of executives and directors not conducted under a Rule 10b5-1 trading arrangement" and noted concerns about issuers using Rule 10b5-1 plans to conduct share repurchases that have the effect of increasing the price of the issuer's stock before sales by corporate insiders.

3 Form 10-Q or Form 10-K for domestic filers and Form 20-F or Form 6-K for foreign private issuers.

4 Under the proposed rules, a 120-day period would have applied to directors and officers, a 30-day cooling-off period would have applied to issuers and no cooling-period would have applied to other persons.

5 The proposed rules would have applied the cooling-off periods to any modifications of a plan.

- n That they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.

These personal certifications are not required where a director or officer terminates an existing Rule 10b5-1 trading arrangement and does not adopt a new/modified trading arrangement for which the affirmative defense is sought. Additionally, there is no requirement to file these certifications or furnish them to the issuer, and the certification would not be an independent basis of liability for directors or officers under Section 10(b) or Rule 10b-5. Instead, these certifications must be included as a representation in the trading plan itself.

No-Overlapping-Trading-Arrangements Condition and Single-Trade-Plan-Limit Condition

Previously, there was no limit on the number of plans or other Rule 10b5-1(c)(1) trading arrangements that a person could have in effect simultaneously. The SEC expressed a concern that setting up multiple overlapping Rule 10b5-1(c)(1) trading arrangements could allow insiders to “exploit inside information by setting up trades timed to occur around dates on which they expect the issuer will likely release material nonpublic information” and to circumvent the cooling-off period.

In response, the Final Rules amend Rule 10b5-1(c)(1) to eliminate the affirmative defense for trades under a trading arrangement when the trader maintains another trading arrangement, or subsequently enters into an additional overlapping trading arrangement, for open market purchases or sales of any class of securities of the issuer.⁶ The Final Rules also amend Rule 10b5-1(c)(1)(ii) so that the affirmative defense would not be available for a single-trade plan if the trader had, within a 12-month period, purchased or sold securities of the issuer pursuant to another single-trade plan. These conditions do not apply to issuers.⁷

With these limitations in mind, overlapping plans may be permitted where an individual (1) enters more than one plan with different broker-dealers or other agents and treats the plans as a single plan so long as the plan complies with all of the rule’s requirements; (2) adopts a plan where the later-commencing plan has a cooling-off period that starts when the first plan terminates; or (3) an additional plan is entered into solely to sell securities as necessary to satisfy tax withholding obligations arising solely from the vesting of a compensatory award.

Good-Faith-Operation Condition

Rule 10b5-1 requires that the contract, instruction, or plan to purchase or sell securities was “given or entered into” in good faith. To “help deter fraudulent and manipulative conduct and enhance investor protection throughout the duration of the trading arrangement,” the Final Rules amend Rule 10b5-1(c)(1)(ii) to add the condition that the person subject to the plan “has acted in good faith with respect” to the plan.

As a result, the affirmative defense would not be available to a trader who (1) cancels or modifies their plan in an effort to evade the prohibitions of the rule; or (2) uses their influence to affect the timing of a corporate disclosure to occur before or after a planned trade to make such trade more profitable or to avoid or reduce a loss.

⁶ Under the proposed rules, overlapping plans would have been prohibited only if they covered the same class of securities.

⁷ Under the proposed rules, these conditions would have applied to issuers.

Note that the SEC also states that the Rule 10b5-1(c)(1) affirmative defense will not be available where a person enters into a Rule 10b5-1 trading plan while aware of material non-public information even if such information is cleansed before any trading takes place under the plan.

New Item 408 Disclosure

Previously, there were no mandatory disclosure requirements concerning the use of Rule 10b5-1 trading arrangements or other trading arrangements by companies or insiders, and issuers were not required to disclose their insider trading policies or procedures.

Under the Final Rules, Item 408(a) of Regulation S-K will require issuers to disclose in their Form 10-Q and Form 10K:⁸

- n Whether, during the issuer's last fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), any director or officer⁹ has adopted or terminated any contract, instruction or written plan to purchase or sell securities of the issuer, whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c);
- n A description of the material terms of the contract, instruction or written plan, including:
 - The date on which the director or officer adopted or terminated the contract, instruction or written plan;¹⁰
 - The name and title of the director or officer;
 - The duration of the contract instruction or written plan; and
 - The aggregate number of securities to be sold or purchased pursuant to the contract, instruction or written plan.¹¹

In addition, Item 408(b) of Regulation S-K will require an issuer, in its annual reports on Form 10-K and proxy and information statements on Schedules 14A and 14C,¹² to disclose whether the issuer has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of the issuer's securities by directors, officers, and employees or the issuer itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the issuer.

8 Foreign private issuers would also be required to provide analogous disclosure in their annual reports pursuant to a new Item 16J in Form 20-F.

9 Unlike the proposed rules, the Final Rules do not require similar disclosures from issuers about their own trading arrangements.

10 This also requires a description of any modification or amendment of an existing Rule 10b5-1 trading arrangement because that is deemed the equivalent of terminating the existing arrangement and adopting a new arrangement.

11 There is no requirement to disclose the price or formula for triggering trades under the plan.

12 Foreign private issuers would also be required to provide analogous disclosure in their annual reports pursuant to a new Item 16J in Form 30-F.

If the issuer has adopted insider trading policies and procedures, it must disclose such policies and procedures.¹³ If the issuer has not adopted such insider trading policies and procedures, it must explain why it has not done so.

The Final Rules note that Item 408(b) of Regulation S-K does not specify all details that an issuer should address in its insider trading policies, nor does it prescribe any specific language that such policies must include. Such details may include: (1) information on the issuer's process for analyzing whether directors, officers, employees, or the issuer itself when conducting an open-market share repurchase have material nonpublic information; (2) the issuer's process for documenting such analyses and approving requests to purchase or sell its securities; or (3) how the issuer enforces compliance with any such policies and procedures it may have, including through gifts of such securities.

Item 408 disclosures are subject to the principal executive and principal financial officer certifications required by Section 302 of the Sarbanes-Oxley Act, and are required to be tagged using Inline eXtensible Business Reporting Language.

New Section 16 Disclosure

Persons subject to Section 16 reporting are required to disclose changes in their beneficial ownership on Form 4 or 5. Form 4 is due before the end of the second business day following the date of execution of the transaction it reports. Form 5 is not due until 45 days after year end.

The Final Rules will require a Form 4 or 5 filer to check a box on that form to indicate whether a sale or purchase reported on that form was made pursuant to a Rule 10b5-1(c) trading arrangement. Filers will also be required to provide the date of adoption of the Rule 10b5-1 trading arrangement, and will have the option to provide additional relevant information about the reported transaction.

As expressed in the proposed rules release, the "length of the filing period for Form 5 may allow insiders to engage in problematic practices involving gifts of securities, such as insiders making stock gifts while in possession of material nonpublic information, or backdating a stock gift in order to maximize a donor's tax benefit." Accordingly, the Final Rules amend Exchange Act Rule 16a-3 to require the reporting of dispositions of bona fide gifts of equity securities on Form 4 (instead of Form 5).

New Item 402 Disclosure

The Final Rules add a new paragraph to Item 402 of Regulation S-K to address the SEC's concern regarding the timing of option grants. The proposed rules release noted that timing option grants to occur immediately before the release of positive material nonpublic information ("spring-loading") can benefit executives with an option award that will likely be in-the-money as soon as the material nonpublic information is made public. Alternatively, if an issuer is aware of material nonpublic information that is likely to decrease its stock price, it may decide to delay a planned option award until after the release of such information ("bullet-dodging").

¹³ In contrast to the proposed rules, the Final Rules do not require this disclosure of the issuer's policies and procedures within the body of the document. This disclosure is satisfied by filing a copy of the insider trading policies and procedures as an exhibit to Forms 10-K and 20-F, which will be a new requirement of Item 601 of Regulation S-K.

Under the Final Rules, to identify if any such timed options are granted, a new paragraph was added to Item 402 of Regulation S-K that requires tabular disclosure of each option¹⁴ award (including the number of securities underlying the award, the date of grant, the grant date fair value, and the option's exercise price) granted to named executive officers¹⁵ within four business days before or one business day after the (i) filing of a periodic report on Form 10-Q or 10-K or (ii) filing or furnishing of a current report on Form 8-K that discloses material nonpublic information.¹⁶

In addition, the Final Rules require narrative disclosure about an issuer's option grant policies and practices regarding the timing of option grants and the release of material nonpublic information, including how the board determines when to grant options and whether, and if so, how, the board or compensation committee takes material nonpublic information into account when determining the timing and terms of an award.

The Final Rules require this disclosure in annual reports on Form 10-K, as well as in proxy statements and information statements related to the election of directors, shareholder approval of new compensation plans, and solicitations of advisory votes to approve executive compensation.¹⁷ For issuers that are subject to CD&A, the narrative disclosure could be included therein. The disclosure would be required to be tagged using Inline eXtensible Business Reporting Language.

Effectiveness

The Final Rules go into effect on February 27, 2023. Until then, the old rules will continue to apply to any Rule 10b5-1 plan then in effect, but if such plan is modified or amended in a manner that changes the amount, price or timing of transactions under the plan, such plan will be deemed to be terminated and then must comply with the Final rules.

Compliance with the amendments to Forms 4 and 5 is required beginning April 1, 2023. Compliance with the new periodic and proxy reporting requirements is required beginning with filings that cover full fiscal periods beginning on or after April 1, 2023.¹⁸

Enforcement Activity

Rule 10b5-1, under the previous and existing regulatory framework, does not provide an exemption from the federal securities laws prohibiting insider trading. Rather, it provides only an affirmative defense. Importantly, this affirmative defense is not available if the insider is in possession of material non-public information at the time the plan is implemented or revised, if the plan is not entered in good faith, or if the plan is part of a scheme to circumvent the insider trading rules. Indeed, the SEC has, and can, bring an enforcement action against an individual for insider trading even when the trades were made pursuant to a 10b5-1 plan.

14 The term "option" includes stock options, stock appreciation rights and similar instruments with option-like features. The new disclosures do not apply to restricted stock or restricted stock units.

15 As defined in Item 402(a)(3) of Regulation S-K.

16 Compared to the proposed rules, the requirement to provide tabular disclosure regarding option grants has been shortened from the proposed 14 days before or after the release of material non-public information to a period of four business days before and one business day after the release.

17 The Final Rules do not exempt smaller reporting companies or emerging growth companies from the Item 402 disclosures.

18 Smaller reporting companies will have an additional six months to comply.

In October 2010, for example, the SEC announced a landmark US\$22.5 million negotiated penalty in an action against Angelo Mozilo, a corporate executive alleged to have “engaged in insider trading in the securities ... by establishing four 10b5-1 sales plans in October, November, and December 2006 while he was aware of [material non-public information].” Mozilo agreed to the penalty after his attempt to dismiss the case in federal court was denied, with the district court judge holding that because the “plans [were] adopted or amended while Mozilo was in possession of material nonpublic information, ... the SEC has adequately stated a claim for insider trading against Mozilo under Section 10(b) and Rule 10b-5.”¹⁹

In 2020, the SEC announced a US\$20 million settlement in an action against an issuer involving accusations of the “improper initiation of, and repurchase of shares pursuant to, a [company’s] Rule 10b5-1 plan while in possession of [material non-public information].”²⁰ However, in settling the case, the SEC found only that the issuer had “fail[ed] to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that stock buyback transactions were executed in accordance with management’s authorization” in violation of Exchange Act Section 13(b)(2)(B).

More recently, in September 2022, the SEC announced a settlement with respondents Sheng Fu and Ming Xu, Chief Executive Officer and former President and Chief Technology Officer of Cheetah Mobile, Inc., a China-based mobile internet company, respectively.²¹ In Cheetah Mobile, the respondents were alleged to have created a Rule 10b5-1 trading plan for selling some of their holdings of Cheetah Mobile securities. Respondents subsequently sold 96,000 shares of Cheetah Mobile securities pursuant to the trading plan. In finding a violation of, among other things, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the SEC stated that at both the time that the respondents established the relevant Rule 10b5-1 plan and when they sold securities pursuant to it, respondents “knew about the material negative trend in revenues” and “know or recklessly disregarded that this information was material and nonpublic.” The SEC found that “because both Sheng Fu and Ming Xu were aware of this material nonpublic information when the created the [Rule 10b5-1 trading plan], the [Rule 10b5-1 trading plan] did not comport with the requirements of Exchange Act Rule 10b5-1.”²² As part of the settlement, respondent Sheng Fu agreed to certain undertakings, including, among other things, undertakings consistent with the then-proposed modifications of Rule 10b5-1. Specifically, respondent agreed to: (1) the imposition of a “cooling-off period of at least 120 days from the adoption or modification of such 10b5-1 plan” if respondent establishes a new 10b5-1 plan or modifies the terms of an existing 10b5-1 plan with respect to Cheetah Mobile securities for a period of five years from the date of the order; and (2) an agreement to maintain, “directly or indirectly, no more than one 10b5-1 Plan at any given time with respect to Cheetah Mobile Securities” for a period of five years from the date of the order.²³ With the modifications discussed herein, these undertakings are now necessary in connection with all Rule 10b5-1 trading plans.

Despite these high-profile exceptions, in general, however, there are few cases against insiders for insider trading when transactions were made pursuant to a plan.

19 *SEC v. Angelo Mozilo*, 2009 WL 3807124 (Order Denying Defendant Angelo Mozilo’s Motion to Dismiss the Complaint) (Nov. 3, 2009).

20 *In the Matter of Andover LLC*, Admin. Proc. File No. 3-20125 (Oct. 15, 2020).

21 *In the Matter of Sheng Fu and Ming Xu*, Admin. Proc. File No. 3-21118 (Sept. 21, 2022) (“*Cheetah Mobile*”).

22 *Cheetah Mobile* at 7-8.

Key Takeaways for Issuers

The Final Rules warrant consideration of the following steps:

- n Adding disclosure controls and procedures with respect to share repurchases, reporting of gifts and reporting of option grants in light of changes to Item 408, Item 402 and Forms 4 and 5;
- n Consider the timing of option grants as they relate to the timing of periodic and current reports;
- n Preparing disclosure needed in response to the new requirements, and considering the impact of such disclosure;
- n Re-examining insider trading policies and procedures relating to the use of Rule 10b5-1 plans and gifts;
- n Providing additional training to officers and directors on the proper use of Rule 10b5-1 plans; and
- n Instituting additional conditions relating to Rule 10b5-1 plans meant to satisfy the Final Rules, which might include:
 - Requiring company approval of adoption of, or participation in, all trading plans and/or plan templates;
 - Imposing a cooling-off period between the establishment or modification of a plan and the first trade pursuant to the plan;
 - Prohibiting multiple or overlapping plans with respect to any issuer securities;
 - Limiting the number of single-trade plans;
 - Adding the new certification requirements to the trading plans/templates;
 - Avoiding a pattern of frequently adopting, amending, or cancelling plans;
 - Imposing mandatory minimum effective periods for trading plans during which such plans cannot ordinarily be modified.

Implications for Private Litigation

Finally, trading by insiders has frequently been fodder for class action plaintiffs seeking to establish scienter to support a broader securities fraud action and to survive a motion to dismiss. Courts have held that “the scienter requirement is met where the complaint alleges facts showing either: (1) a motive and opportunity to commit the fraud; or (2) strong circumstantial evidence of conscious misbehavior or recklessness” (e.g., in cases where defendants “benefited in a concrete and personal way from the purported fraud”).²⁴

23 Id. at 9.

24 *Emps. Ret. Sys. of Gov't of the Virgin Islands, et al. v. Blanford, et al.*, 794 F.3d 297, 306 (2d Cir. 2015) (internal citations and quotation marks omitted).

To the extent plaintiffs point to stock trades to support a strong inference of scienter, plaintiffs must allege that the trades were “unusual” or “suspicious.”²⁵ Courts have held that this determination turns on a number of factors: (1) the amount of net profits realized from the sales; (2) the percentages of holdings sold; (3) the change in volume of insider defendant’s sales; (4) the number of insider defendants selling; (5) whether sales occurred soon after statements defendants are alleged to have known were misleading; (6) whether sales occurred shortly before corrective disclosures or materialization of the alleged risk; and (7) whether sales were made pursuant to trading plans such as Rule 10b5–1 plans.²⁶ A defendant may attempt to rebut an inference of scienter by arguing that the trades were made pursuant to a Rule 10b5-1 plan. Thus, in this context, defendants are not limited to using a 10b5-1 plan as an affirmative defense; instead, a 10b5-1 plan may be used to undermine allegations on a motion to dismiss.²⁷

Ordinarily, the use of a non-discretionary trading plan that sells fixed quantities of stock on pre-scheduled dates undermines any inference of scienter.²⁸ However, courts have been willing to entertain arguments that the size and timing of sales pursuant to 10b5-1 trading plans can nevertheless support an inference of scienter. Similarly, plaintiffs have argued that where 10b5–1 trading plans are entered into during the class period, they may not be a cognizable defense to scienter allegations on a motion to dismiss as a “clever insider might maximize their gain from knowledge of an impending price drop over an extended amount of time, and seek to disguise their conduct with a 10b5-1 plan.”²⁹

As adopted, the Final Rules are likely to curtail any perceived abuses, and insiders who adhere to these more stringent requirements are likely to have an even better chance to defeat allegations of scienter where any trades at issue occurred pursuant to a properly implemented or amended Rule 10b5-1 trading plan.

25 See *In re Gildan Activewear, Inc. Sec. Litig.*, 636 F.Supp.2d 261, 270 (S.D.N.Y. 2009); Plaintiffs bear the burden of demonstrating that Defendants’ stock sales are unusual. *Acito v. IMCERA Grp.*, 47 F.3d 47, 54 (2d Cir. 1995).

26 *Glaser v. The9 Ltd.*, 772 F. Supp. 2d 573, 587 (S.D.N.Y. 2011).

27 See *In re Able Labs. Sec. Litig.*, 2008 WL 1967509, at *28 (D.N.J. Mar. 24, 2008).

28 *In re Lululemon Sec. Litig.*, 14 F.Supp.3d 553, 585 (S.D.N.Y. 2014).

29 *Freudenberg v. E*TRADE Financial Corp.*, 712 F.Supp.2d 171 at 199 (S.D.N.Y. 2010).

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