



MAYER | BROWN

# Rule 10b5-1 and Share Repurchase Disclosure Proposals

January 26, 2022

## John Ablan

Partner, Mayer Brown  
+1 312 701 8018  
[jablan@mayerbrown.com](mailto:jablan@mayerbrown.com)

## Anna Pinedo

Partner, Mayer Brown  
+1 212 506 2275  
[apinedo@mayerbrown.com](mailto:apinedo@mayerbrown.com)

## Laura Richman

Counsel, Mayer Brown  
+1 312 701 7304  
[lrichman@mayerbrown.com](mailto:lrichman@mayerbrown.com)

# Agenda

- Rule 10b5-1 basics
- Proposed SEC amendments
- Share repurchase disclosure proposed amendments
- Areas of SEC comment
- Best practices for public companies
- What to expect in months ahead on these issues

# Rule 10b5-1 basics

# Rule 10b5-1

- Rule 10b5-1 specifies that a sale constitutes trading on the basis of material non-public information (MNPI) when the person making the sale was aware of MNPI at the time the sale was made
- Rule 10b5-1, adopted in August 2000, codifies the position of the Securities and Exchange Commission (SEC) that awareness, not use, of MNPI is sufficient to establish liability in insider trading cases
- The rule creates a mechanism whereby any person or entity can enter into a trading plan that will provide an affirmative defense to a claim that a trade occurred “on the basis of” MNPI

# Rule 10b5-1

*Available to persons and entities:* Provides that trades made pursuant to trading plans established in compliance with Rule 10b5-1 are deemed not to have been made on the basis of MNPI

*Available to entities:* Provides that an entity will not be liable if it demonstrates that the person making an investment decision on behalf of the entity was not aware of MNPI and that the entity had implemented reasonable policies and procedures to prevent insider trading

- *An issuer may also rely on 10b5-1 for itself:* An issuer should indicate that it is not in possession of MNPI when, for example, it enters into a stock repurchase program, an accelerated share repurchase program, etc.
- A **Rule 10b5-1 plan** is a trading program designed to comply with Rule 10b5-1(c) of the Securities Exchange Act of 1934, as amended (Exchange Act)
- Rule 10b5-1 plans allow “insiders” of public companies (or others) to establish a trading plan to purchase or sell predetermined amounts of securities at predetermined times

# Elements of a Rule 10b5-1 Plan

- To benefit from the protections of the affirmative defense, a 10b5-1 plan must:
  - Specify the amount, price, and date of the purchases or sales;
  - Include a written formula for determining the amount, price, and date of the purchases or sales; or
  - Not permit the person to exercise any subsequent influence over how, when, or whether to effect the purchases or sales
- Alteration or deviation from the plan disqualifies the plan from the protection of the Rule
- The plan must be entered into in **good faith** and not as part of a strategy or scheme to evade the prohibitions on insider trading
- Anyone other than the person adopting the 10b5-1 plan may execute trades; A 10b5-1 plan is typically an arrangement between a company insider and that person's broker, wherein the broker executes trades according to the plan's specifications

# Benefits of a Rule 10b5-1 Plan

- Aside from the affirmative defense, other benefits associated with a trading plan include:
  - A higher level of certainty for insiders planning securities transactions
  - More opportunities for insiders to sell their securities, especially if an issuer's trading policy allows for trading during a blackout period under the plan
  - Less negative publicity associated with insiders' sales
  - Decreased burden on counsel/compliance officers who otherwise would need to make individual determinations about the availability of possession of MNPI every time an insider seeks to move on a securities transaction

# Former SEC Chair Clayton's views

- In a letter to Congressman Brad Sherman, former SEC Chair Clayton noted the importance of a strong control environment, especially in times of heightened market volatility and uncertainty, such as during the COVID-19 pandemic
- Clayton outlined specific issues that could be revisited, in order to promote market integrity and investor confidence, and demonstrate a commitment to “good corporate hygiene,” including:
  - Insider trading policies for senior executives and board members
  - Terms and administration of Rule 10b5-1 plans
  - Issuing and pricing stock options



# Proposed Amendments to Rule 10b5-1 and Related Company Disclosures

# Observed Suspicious Behavior

- Courts, legislators and academics have expressed concern that Rule 10b5-1 has allowed traders to opportunistically trade with MNPI and avoid liability
  - Overlapping plans for the same security
  - Commencing trades soon after adoption of a new plan
  - Modification of an existing plan
  - Companies using share repurchase 10b5-1 plans to boost share prices ahead of sales by corporate insiders
  - Grants of equity award options in coordination with release of MNPI
  - Opportunistically gifting securities while aware of MNPI

# Proposed Amendments to Rule 10b5-1

- Minimum cooling-off periods between adoption of 10b5-1 Plan and first purchase: (a) officers & directors: 120 days; and (b) issuers: 30 days
  - Cancelling one or more trades would constitute a “modification” and restart the applicable cooling-off period; no *de minimis* exception
- Certifications from officers and directors that they (i) lacked MNPI when plan was adopted (or modified) and (ii) adopted (or modified) the plan in good faith and not part of a scheme to avoid insider trading prohibitions
  - Insiders would be required to furnish their certifications to the issuer and retain them personally for 10 years
  - But no public filing requirement

# Proposed Amendments to Rule 10b5-1

- Prohibitions for *all traders* (i.e., not just officers and directors) on:
  - Overlapping plans for open market trades of the same class of securities (transactions with the issuer exempted); and
  - Having more than one “single-trade” 10b5-1 Plan during any 12-month period
- Good faith operation of 10b5-1 Plans (as opposed to good faith *entry*)

# Proposed New Disclosure for Public Companies

- Quarterly disclosure of adoption or termination of 10b5-1 Plans and other trading arrangements by public companies and their officers and directors
  - Would apply to public companies using domestic forms (e.g., Form 10-Q and Form 10-K) (i.e., not applicable to foreign private issuers (FPIs))
  - Disclosures would be required to include material terms of the 10b5-1 Plan or arrangement, such as:
    - Date of adoption or termination;
    - Duration; and
    - Number of securities to be sold or purchased

# Proposed New Disclosure for Public Companies

- Yearly disclosure of internal insider trading policies and procedures designed to promote compliance with insider trading laws
  - Disclosure should provide “meaningful information from which investors can assess the sufficiency of [such] insider trading policies and procedures” for example:
    - The issuer’s process for analyzing whether insiders, or the issuer itself when conducting an open-market share repurchase have MNPI;
    - Issuer’s process for documenting and approving requests to trade in its securities; or
    - How the issuer enforces compliance with any such policies
  - If an issuer has not adopted such policies it would have to disclose why it has not done so
  - FPIs to make similar annual disclosures in Form 20-F

# Proposed New Disclosure for Public Companies

- New Executive Compensation Disclosure
  - Tabular disclosure of option awards granted to NEOs within 14 calendar days before or after the filing of a periodic report (10-Q or 10-K), issuer share repurchase or current report on Form 8-K that contains MNPI
    - Date of grant, fair value at grant date and option's exercise price
    - Market prices of underlying securities on trading days before and after disclosure of MNPI
  - Narrative disclosure of policies regarding the timing of option grants and release of MNPI, including how the board determines when to grant options and how the board takes MNPI into account when determining the timing and terms of an award
  - Information could be incorporated by reference from annual proxy statement. No exemption for SRCs or EGCs; FPIs not required to disclose this information

# Proposed Amendments to Section 16's Forms 4 and 5

- Section 16 filers would be required to indicate by checkmark whether a reported transaction was executed pursuant to a 10b5-1 Plan
  - Filers could also voluntarily indicate whether transaction was part of a pre-planned contract not intended to satisfy Rule 10b5-1
- *Bona fide* gifts of securities (whether part of a 10b5-1 Plan or not) would be required to be reported on a Form 4 (as opposed to a Form 5)

# Notable Requests for Comment

- Cooling-off period:
  - Should a mandatory cooling-off period be limited to insiders only? Or should there be one for all traders?
  - Should “modification” be defined and should the cooling off-period not reset for *de minimus* changes?
- Prohibitions:
  - Are there any legitimate uses of overlapping 10b5-1 Plans?
- Executive Compensation Disclosures:
  - Is the 14-day time period appropriate or should it be shorter or longer?
  - Is a one-day period after an issuer’s disclosure of MNPI sufficient for the MNPI to be reflected in the price of that issuer’s securities?



# Share Repurchase Disclosure Proposal

# Share Repurchase Background

- Share repurchase disclosure “modernization” needs to be understood in context
- The proposing release reports \$700 billion of share repurchases in 2020
- Among the ways companies may repurchase their shares are open market purchases (including pursuant to Rule 10b-18), tender offers, private negotiated transactions and accelerated share repurchases (ASRs)
- The level of share repurchase activity in recent years has attracted legislative, regulatory, academic and media attention
- The increase in repurchase activity resulted in part from tax reform, but in addition strategic transactions have often been accompanied by share repurchases
- There have been various legislative proposals to limit share repurchases over the past few years

# Existing Disclosure

- Currently, Item 703 share repurchase disclosure is required quarterly for domestic issuers in Form 10-Q and Form 10-K
  - Foreign private issuers provide comparable disclosure annually on Form 20-F
- Existing filings are not required to, and typically do not, disclose the specific dates on which buybacks will be executed
- Timeliness of information issues
  - Details of a January share repurchase by a calendar-year domestic issuer is not currently required to be disclosed until the first quarter Form 10-Q is filed in May
  - SEC believes asymmetries may exist between issuers and affiliated purchasers and investors with regard to information about the issuer and its future prospects

# Form SR: One Business Day Disclosure

- Proposed new Form SR to be filed within one business day after buyback of equity securities registered pursuant to Section 12 of Exchange Act
- SEC requests for comment on timing:
  - Would less frequent disclosure of daily share repurchases, such as weekly, monthly, or quarterly disclosure, provide sufficiently timely information?
  - Should Form SR be required within one business after the order clears and settles and the issuer receives trade confirmation, as opposed to one business day after execution?

# Issuers Required to Submit Form SR

- Form SR requirement applies to issuers of equity securities registered pursuant to Section 12 of Exchange Act
  - This includes foreign private issuers and certain registered closed-end funds
- SEC request for comment on issuers subject to Form SR:
  - Should the SEC exempt foreign private issuers and/or registered closed-end funds from the requirement to file a Form SR or provide different requirements?
  - Should the SEC exempt non-accelerated filers, smaller reporting companies, or emerging growth companies from the proposed Form SR reporting requirement?

# Form SR Mechanics

- Information on Form SR will be public once it appears on EDGAR
- Form SR would have to be signed by an officer of the company
- As proposed, Form SR will be “furnished” as opposed to “filed”
- Disclosures to be tagged in machine readable form in inline XBRL
- Amended Form SR required to correct material errors or changes to information previously reported on Form SR

# Contents of Form SR

- Form SR to disclose:
  - The date of the repurchase
  - The class of securities purchased
  - The total number of shares/units purchased
  - The average price paid per share/unit
  - The total number of shares/units purchased on the open market
  - The total number of shares/units purchased pursuant to Rule 10b-18
  - The aggregate total number of shares/units purchased under a Rule 10b5-1 Trading Plan

# Additional SEC Comment Requests: Form SR

- Among the SEC's other requests for comment on Form SR are:
  - Instead of adopting Form SR, should Form 8-K or another existing form be amended to require daily repurchase disclosure?
  - Should issuers be required to provide daily, weekly, or biweekly repurchase disclosure in an exhibit to the issuer's periodic reports?
  - Should there be a *de minimis* exception from Form SR reporting?
  - Should the SEC add any disclosure requirements to Form SR?

# Additional Disclosures in Periodic Reports

- Proposed amendment to Item 703 of Form S-K (and related amendment to Form 20-K for foreign private issuers) would expand buyback disclosure to include:
  - Objective or rationale for the buyback
  - Process/criteria used to determine repurchase amounts
  - Policies and procedures relating to purchases and sales of company securities by directors and officers during a repurchase program, including restrictions
  - Whether repurchases were made pursuant to a Rule 10b5-1 Plan and if so, the date that the Plan was adopted or terminated
  - Whether purchases were made in reliance on the Rule 10b-18 non-exclusive safe harbor

# SEC Comment Requests: Item 703 Of S-K

- Should the SEC clarify or require how share repurchase programs are announced?
- Does the proposed obligation to describe the objective or rationale for repurchases and process or criteria used to determine the amount of repurchases provide useful information to investors?
- Should information regarding how share repurchases are financed or their anticipated or actual impact on leverage ratios or the cost of capital be required?

# Officer and Director Trades within 10 Business Days of Share Repurchase Program Announcement

- Check box added to Issuer Repurchases of Equity Securities table
  - Reporting if any Section 16 reporting officers and directors traded in company securities within 10 business days of announcement of share repurchase plan or program
- SEC comments related to checkbox:
  - Would investors find the 10-business day checkbox information useful?
  - Would a shorter or longer period than business days be appropriate?
  - Should the SEC provide guidance about the issuer's scope of inquiry and explain what an issuer may rely on for purposes of complying with the checkbox requirement?



# Practical Considerations

# Practical Considerations and Best Practices

- Public companies should conduct an analysis of their insider trading policies and consider:
  - Adopting limits on their insiders' modification or cancellation of 10b5-1 Plans
  - Adopting a required cooling-off period for their insider's 10b5-1 Plans
  - Making clear that such policies apply to gifting
- Public companies should also start devising internal controls and procedures designed to gather the information proposed for quarterly and annual disclosure required by the Rule 10b5-1 amendments

# Practical Considerations and Best Practices cont'd.

- Combined impact of the two proposals on company buybacks
  - Interplay of cooling off period and restriction on overlapping plans
  - Considerations for ASR transactions
- The potential impact of daily reporting on share price
- Disclosure controls and procedures for share repurchase disclosure
  - Daily gathering of information for company buybacks
  - Process for amendments
  - Keeping track of entry, termination and modification of Rule 10b5-1 trading plans
  - Gathering information regarding officer and director trades in company securities

# Practical Considerations and Best Practices *cont'd.*

- Potential for existence of MNPI to be signaled by a pause in share repurchases, revealed by the absence of a Form SR following regular repurchase reports
- Preparing for Form SR reporting
- Public company buybacks without Rule 10b5-1 affirmative defense
- Impact of proposed disclosure of option grants within 14 days of
  - Form 10-K or Form 10-Q,
  - Company share repurchase, or
  - Form 8-K containing MNPI on timing of option awards
- Consider submitting comments—due 45 days after publication in the *Federal Register*

# Supplemental Materials and Additional Resources

Read more:

- [What's the Deal?: Rule 10b5-1 Plans](#)
- [What's the Deal?: Rule 10b-18](#)
- [SEC Proposes New Rules on Share Repurchase Disclosure](#)
- [SEC Proposes Amendments to Rule 10b5-1's Affirmative Defense to Insider Trading Liability](#)
- [Top 10 Practice Tips: Stock Repurchase Programs](#)
- [Profiting Off Pandemic: The SEC Issues a Sharp Reminder About Companies' Obligations Regarding Insider Trading and MNPI](#)



Writing on the Wall

Translating Securities with Mayer Brown

FOR EXPLANATIONS OF OVER 900 SECURITIES, DERIVATIVES, FINANCIAL SERVICES, AND CAPITAL MARKETS TERMS AND PHRASES.

[writingonthenewall.com](http://writingonthenewall.com)



**OUR FREE WRITINGS & PERSPECTIVES BLOG PROVIDES NEWS AND VIEWS ON SECURITIES REGULATION AND CAPITAL FORMATION.**

The blog provides up-to-the-minute information regarding securities law developments and commentary on developments relating to private placements, IPOs, and other securities topics.



SUBSCRIBE

## Disclaimer

These materials are provided by Mayer Brown and reflect information as of the date of presentation.

The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.

You may not copy or modify the materials or use them for any purpose without our express prior written permission.

[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

[mayerbrown.com](https://www.mayerbrown.com)

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Citequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.