Published on *The National Law Review* https://natlawreview.com

Impact of New SEC Regulations on Insider Trading Policies

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Late last year, the Securities and Exchange Commission (SEC) adopted new disclosure requirements with respect to insider trading policies and procedures. These new disclosure requirements are codified in Item 408(b) of Regulation S-K. It is important to note that SEC regulations do not specifically govern a registrant's insider trading policies themselves. Rather, SEC regulations only govern the disclosure of whether a registrant has adopted an insider trading policy (the Policy). As a result, registrants have some flexibility in crafting their insider trading policies and procedures so long as they are designed to assist directors, officers, and other employees in complying with the insider trading prohibitions and other requirements of the federal securities laws and regulations.

Pursuant to the new Item 408(b), registrants are required to disclose on an annual basis whether they have adopted insider trading policies and procedures governing the purchase, sale, or other dispositions of the registrant's securities by directors, officers, other employees, and the registrant itself. If a registrant has not adopted such policies and procedures, it must explain why it has not done so. These disclosures must be made under Part III of a registrant's Form 10-K or may be incorporated by reference from a definitive proxy or information statement involving the election of directors if filed within 120 days of the end of the registrant's fiscal year. In addition, registrants must file a copy of the Policy as an exhibit to their Form 10-K.

Components of the Policy

In general, these policies provide guidelines with respect to transactions in the registrant's securities designed to assist the registrant's directors, officers, and other employees in understanding their obligations under the federal securities laws. Note

that each affected individual is personally responsible to comply with the Policy and applicable legal requirements.

Applicability of the Policy. The Policy should apply to all transactions of the registrant's securities, including common stock, restricted stock, restricted stock units, options, and warrants to purchase common stock and any other debt or equity securities the registrant may issue from time to time, such as bonds, preferred stock, and convertible debentures, as well as derivative securities relating to the registrant's securities, whether or not issued by the registrant, such as exchange-traded options. The Policy should apply to all directors, officers, and other employees of the registrant. It should also apply to members of their immediate families who reside with them, anyone else who lives in their households, and family members who live elsewhere but whose transactions in registrant securities are directed by them or subject to their influence and control. Most importantly, these policies often impose blackout periods and preclearance procedures on directors, officers, and certain other designated employees who routinely receive or have access to information that is both "nonpublic" and "material" (often referred to as Insiders).

General and specific statements of the Policy. A registrant's Policy should include a general statement to the effect that the registrant will oppose the unauthorized disclosure of any material nonpublic information acquired in the workplace, the use of material nonpublic information in securities trading, and any other violation of applicable securities laws. The Policy should also include a specific statement to the effect that no directors, officers, or employees shall engage in any transactions of the registrant's securities during any period during which he or she possesses material nonpublic information concerning the registrant, except as permitted by the Policy.

What is "material" information? Information is "material" if there is a substantial likelihood that a reasonable investor would consider the information important in deciding whether to purchase, sell, or hold a security, or if there is a substantial likelihood that the information would be viewed by a reasonable investor as significantly altering the total mix of publicly available information about the company. Any information that could reasonably be expected to affect the market price of a security is likely to be considered material.

What is "nonpublic" information? "Nonpublic" information is information that is not available to the general public. For information to be considered public, it must be widely disseminated in a manner making it generally available to investors, including through the issuance of a press release or a filing with the SEC. In addition, even after a public announcement of material information, a reasonable period of time must elapse in order for the market to absorb and react to the information.

Mandatory guidelines. Policies often include certain mandatory guidelines applicable to Insiders that are designed to promote compliance with both the Policy and applicable federal securities laws to avoid the appearance of insider trading.

Trading blackout period. Policies often require that Insiders refrain from conducting transactions involving the purchase or sale of the registrant's securities during certain blackout periods as determined by the registrant, such as the period commencing on the 15th calendar day of the third fiscal month of each of the first three fiscal quarters (i.e., March 15, June 15, and September 15) and the first day of the last month of the fourth fiscal quarter (i.e., December 1), and ending at the close of business on the third trading day following the date of public disclosure of the financial results for each fiscal quarter.

Preclearance of trades. Policies often require Insiders to preclear any transactions in the registrant's securities, subject to limited exceptions. For example, the Policy may require Insiders to obtain preclearance from the registrant's designated insider trading compliance officer in writing not less than two business days prior to commencing any trade or transfer of the registrant's securities (such as any purchase or sale; stock plan transaction, such as an option exercise involving a sale of the acquired securities; or any gift, transfer to a trust, or any other transfer). The Policy should provide that the transaction will not occur absent such preclearance and note that the insider trading compliance officer is not under any obligation to approve a transaction submitted for preclearance and may decide not to permit it.

Other provisions of the Policy. Numerous other provisions may be incorporated into such a Policy, including exceptions to the Policy, use of Rule 10b5-1 plans, permissibility of pledging and hedging of registrant securities, applicability to post-termination transactions, and applicability to publicly traded options and to transactions in securities of other companies with which the registrant does business. As noted above, registrants have some flexibility in setting certain elements of their policies. However, because these policies will be publicly filed, they will now be more closely scrutinized by stockholders, activists, and other interested parties, so registrants should ensure that their policies are up to date and thorough.

SEC-registered companies should consult with their SEC counsel regarding the design and components of an insider trading policy to ensure the Policy's compliance with the SEC's insider trading laws and rules. In addition, in light of the SEC's new disclosure requirements regarding such policies that will be required in the upcoming proxy statements and Form 10-Ks, we suggest counsel be promptly consulted.

National Law Review, Volumess XIII, Number 334