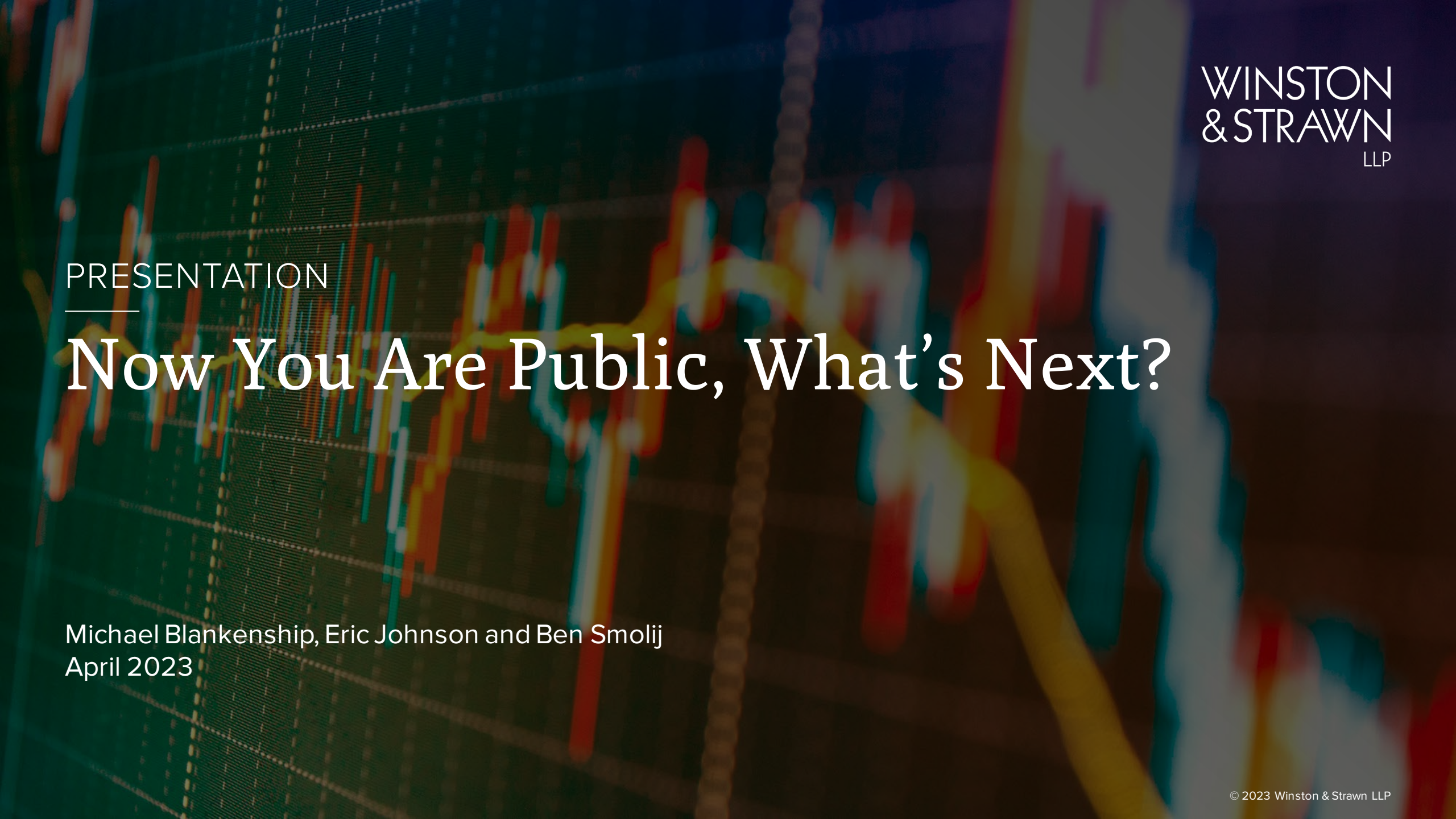

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PRESENTATION

Now You Are Public, What's Next?

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Boards and Committees

Director Independence Requirements

- Nasdaq and NYSE require that a majority of the board of directors be independent and that a company's independent directors hold regularly scheduled meetings at which only independent directors are present.
- Audit, compensation and nominating committees must be filled with independent directors.
- Heightened independence requirements for Audit Committees.
- SEC regulations, as well as Nasdaq and NYSE corporate governance rules, require that a company must disclose in its annual proxy statement those directors that the board has determined to be independent.

Committees

- NYSE listed companies must have audit, compensation and nominating/corporate governance committees
- Nasdaq listed companies must have audit committee plus independent oversight of executive compensation
- Other committees (appropriate depending on industry):
  - **Disclosure**
  - **Executive**
  - **Finance**
  - **Compliance**
  - **Risk**
  - **Technology**
  - **ESG**
- Each committee should have governing charter

Board Composition

- Consider Skills Matrix
  - Specific experience, qualifications, attributes and skills
- Link attributes to business specific circumstances
- Recent focus on functional experience in ESG, technology, cybersecurity, human capital and climate
- Service on other boards

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Fiduciary Duties

Fiduciary Duties of Directors Overview

DUTY OF CARE

Be informed of all material information reasonably available and relevant to the matter at hand

DUTY OF LOYALTY

Act in the best interests of the company and its stockholders while avoiding conflicts of interest and remaining independent of outside influences that could affect business judgment

DUTY OF GOOD FAITH

Subsumed within duty of loyalty and violated by intentionally disregarding known risks or a knowing failure to apply minimum levels of diligence

Duty of Loyalty including good faith and oversight are not exculpated under DGCL section 102(b)(7)

- **Duty of Disclosure:** In the context of a public transaction, there is also a duty of disclosure
  - Duty to disclose fully and fairly all material information within the board's control when it seeks shareholder approval
  - The court may also apply the heightened standard of review due to conflicts of interest

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Periodic Reporting Requirements

Periodic Reporting Requirements

- Public companies are subject to the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and as such must file annual, quarterly and current reports with the Securities and Exchange Commission (the "SEC").
- The reporting requirements involve filing with the SEC:
  - Annual Reports on Form 10-K;
    - Form 10-K instructions require the inclusion of all required executive compensation and corporate governance disclosure
  - Quarterly Reports on Form 10-Q; and
  - Current Reports on Form 8-K.

Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q

- Form 10-K and 10-Q filing deadlines depend on whether the filer is considered a non-accelerated filer, an accelerated filer or a large accelerated filer.
- Newly public companies are often “non-accelerated filers,” which means they must file Forms 10-K and 10-Q within 90 and 45 days, respectively, of the end of the applicable fiscal period
- Scaled disclosure for EGCs, SRCs.

Emerging Growth Companies

- An EGC is a company with annual gross revenues of less than $1,070,000,000 during its most recent fiscal year.
- Companies retain EGC status until the earlier of:
  - The end of the fiscal year in which its annual revenues exceed $1,070,000,000;
  - The end of the fiscal year in which the fifth anniversary of its IPO occurred;
  - The date which the issuer has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
  - The date on which the issuers qualifies as a large accelerated filer.

Exemptions for Emerging Growth Companies

- EGCs are exempt from:

The requirement under Section 14A(a) and (b) of the Exchange Act to hold stockholder advisory votes on executive compensation and golden parachute compensation.

Once issuers lose their EGC status, they must begin to hold "say on pay" votes no later than: (i) three years after the IPO date, if a company was an EGC for less than 2 years after completing its IPO; or (ii) one year after losing EGC status.

The requirement under Section 953(b)(1) of Dodd-Frank to disclose the ratio between the annual total compensation of the CEO and the median of the annual compensation of all employees (*i.e.*, CEO pay ratio).

The requirement to provide certain other executive compensation disclosure under Item 402 of Regulation S-K (including a compensation discussion analysis ("CD&A") in any later registration statement or periodic report).

The requirement to provide, in any later registration statement or periodic report, selected financial data for any period before the earliest audited period presented in their IPO registration statements.

Section 404(b) of the Sarbanes-Oxley Act of 2002 requiring auditor attestation of a company's internal controls and procedures.

EGCs must present management's assessment and conclusions regarding the effectiveness of internal controls and procedures.

Smaller Reporting Companies

- In addition to being an EGC, new issuers are often "smaller reporting companies" (SRC), which is a company that: (i) has a public float of less than $250 million or (ii) has less than $100 million in annual revenues **and** public float of less than $700 million.
- SRCs are eligible to take advantage of scaled disclosure requirements, many of which overlap with the EGC accommodations, including the ability to omit:
  - selected financial data from Form 10-K;
  - disclosure regarding policies and procedures pertaining to related party transactions; and
  - risk factors from Exchange Act filings.
- Practically speaking, many EGCs who are also SRCs typically follow the EGC disclosure regime.

Current Reports on Form 8-K

- Current Reports on Form 8-K must be filed with the SEC upon the occurrence of certain events, including, among other things:
  - Change in accountants;
  - Departures and elections of directors and certain executive officers;
  - Entry into a material compensatory plan, contract or arrangement with certain executive officers;
  - Submission of matters to a vote of the Company's stockholders; and
  - Regulation FD disclosures.
- Generally, Current Reports on Form 8-K must be filed with the SEC within four business days of the occurrence of the event.

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Section 16

Section 16

- Under Section 16 of the Exchange Act, company "insiders" (*i.e.*, directors, executive officers and 10% stockholders) are required to:
  - Publicly report (through Form 3, 4 and 5 filings with the SEC) their equity ownership of shares in the company;
    - Form 4 reporting is due within two (2) business days following the transaction in company securities. A Form 3 was filed on behalf of each of the officers and directors in connection with the IPO but any subsequent transactions must be reported on Form 4 within two days of any trade.
    - Company must post on its website all Forms 3, 4 and 5 by the end of the business day after filing.
    - Company must keep the reports posted for 12 months.
    - Company may post the reports directly or by hyperlinking to the Section 16 filings via a third-party service provider (or EDGAR).
  - Disgorge "short-swing profits" from trading in the shares; and
  - Refrain from making short sales of shares.

Section 16(a) – Beneficial Ownership

- The SEC has issued detailed rules for determining which shares are deemed beneficially owned, which may include more shares than are owned of record by the Section 16 insider.
- A person's voting or investment power over the security is a key factor in determining beneficial ownership.
- Beneficial ownership for purposes of reporting holdings and transactions to the SEC (and for short-swing profit liability) is based on the insider's direct or indirect pecuniary interest in the securities and the insider's ability to profit from purchases or sales of the securities.

Section 16(b) – Short Swing Profits

- Section 16(b) requires Section 16 insiders to pay over to the Company any "short-swing profits" realized on a purchase and sale or sale and purchase of the Company's shares within a period of less than six months.
- Liability under Section 16(b) is strict and no proof of possession or use of insider information is necessary.
- The obligation to disgorge short-swing profits to the Company may be enforced by the company but is ordinarily enforced by its stockholders.
- Certain transactions in securities under employee benefit plans are exempt from short-swing profits liability if approved by the Board or a committee thereof.

Schedule 13G

- In addition to any required filings under Section 16, any person who, directly or indirectly, beneficially owns more than 5% of the Company's common stock must file a Schedule 13G to report his or her beneficial ownership as of the last day of the calendar year.
- Generally, a Schedule 13G must be filed within 45 days after the end of the calendar year in which the person became obligated to report his or her beneficial ownership and/or changes in his or her beneficial ownership.
- If the acquirer intends to pursue control of the company, it must file a Schedule 13D.

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General Disclosure Requirements

General Disclosure Requirement – Duty to Disclose – Exchange Act

- In the absence of insider trading or previous inaccurate disclosures, under federal securities laws, a public company generally has no affirmative obligation to disclose material information other than the obligation to disclose required information in its current and periodic reports (Forms 10-K, 10-Q and 8-K).
- Specific circumstances in which a company has an affirmative disclosure obligation:
  - An insider selectively discloses material nonpublic information.
  - The company is selling or buying its own stock.
  - Information previously disclosed to the public is inaccurate or no longer accurate.

General Disclosure Requirement – Materiality

- Defined in Rule 405 under the Securities Act. The term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those **matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.**
- Must be a substantial likelihood that it would be viewed by a reasonable investor as significantly altering the "total mix" of available information.
  - Note: does NOT require a finding that a misstated or omitted fact would result in a reasonable investor changing an investment or voting decision.
- Certain disclosure items have materiality thresholds built in, but companies are cautioned against a formulaic approach to materiality determinations.

General Disclosure Requirement – Duty to Correct

- A company is generally obligated to correct prior statements that were false or misleading when made.
  - Courts may not impose duty to correct if original statement is vague or indefinite or if the newly-found information is unreliable.
  - Courts are hesitant to apply the duty to correct in cases involving forward-looking statements unless the statements were based on untrue historical information.

General Disclosure Requirement – Duty to Update

- The duty to update exists when a clear, factual and forward-looking statement containing some continuing representation to investors becomes misleading in light of later events.
  - Key considerations are whether the original statement is still "alive" in the sense of being relied on by reasonable investors and whether the statement relates to a "fundamental change" to the issuer.
  - Courts have found that duty to update does not apply to (i) ordinary financial projections, (ii) vague statements / puffery and (iii) historical statements.

EXAMPLE

***SEC v. Walgreens* (September 2018)**

- Company and management learned that projections were 20% off, but CEO and CFO repeatedly re-affirmed guidance without disclosing heightened risks of achieving such results.
- SEC fined Walgreens $34.5 million and CEO and CFO were fined $160,000 each.

General Disclosure Requirement – Risk Factors

- Risk factors are cautionary statements about risks a company faces that could have a material adverse impact on the company's business, financial condition and results of operations, or that otherwise make investing in the company or its securities speculative or risky.
- The risk factors are included in a separately-captioned heading of a periodic report (or prospectus) and provide investors with management's views on the risks the company faces and, if those risks materialize, the effect they may have on (i) the company's business, financial condition and results of operations and (ii) the value of company securities held by investors.

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Insider Trading

Insider Trading – Rule 10b-5

- It is unlawful for insiders to trade in a company's securities while in possession of material nonpublic information.
- "Possession" not "Use"—Rule 10b5-1 codifies the position of the SEC that "possession," not "use," of material nonpublic information is sufficient to establish liability.
- An insider's immediate family and close associates are presumed to have the insider's knowledge.
  - Insiders should discourage these persons from trading when the insider is in possession of material nonpublic information.
- Tipping—It is unlawful for corporate insiders to pass material nonpublic information to ("tip") outsiders who may trade, and for those outsiders to trade on the tip.
  - Do not discuss material nonpublic information with anyone outside the company
- Misappropriation—It is also unlawful for an employee to trade in the securities of another company while in possession of material nonpublic information about the other company obtained in violation of a duty owed to his or her company.

Rule 10b5-1 Trading Plans

- Goal is to avoid liability in the context an SEC investigation or lawsuit alleging insider trading brought under Section 10(b) of the Act and Rule 10b-5 thereunder.
- To succeed in a Rule 10b-5 action, plaintiffs must prove scienter – that the insider knowing traded on and profited from material nonpublic ("insider") information.

Companies' Disclosure Obligations Around Insider Trading

- Amendments adopted in late 2022 require companies to disclose several things, including:
  - *Quarterly:* disclose any director's or officer's adoption, termination, or modification of either a Rule 10b5-1 plan or other pre-planned trading arrangement and its material terms
  - *Annually:* disclose the company's insider trading policies and procedures
  - Disclosures around options where the award of the option(s) was close in time to the release of material nonpublic information

Companies' Disclosure Obligations Around Insider Trading

- For Section 16 filers
  - Report which transactions were intended to satisfy the affirmative defense conditions under Rule 10b5-1(c)
  - Report dispositions of bona fide gifts of equity securities on Form 4 within two (2) business days of the transaction's execution (instead of on Form 5)
  - Item 408 of Regulation S-K requires disclosure in Annual Reports on Form 10-K and proxy statements as to whether the issuer has adopted insider trading policies applicable to directors, officers, employees and the issuer itself. These policies must be filed as an exhibit under Item 601.

Disclosure of Rule 10b5-1 Trading Plans

- Rule 10b5-1, as amended in 2022, requires the company to disclose the adoption, termination, or modification of a Rule 10b5-1 trading plan or other trading arrangement on a quarterly basis and its material terms, including:
  - The name and title of the director or officer;
  - The date of adoption or termination of the Rule 10b5-1 or other trading arrangement;
  - The duration of the Rule 10b5-1 or other trading arrangement; and
  - The aggregate number of securities to be sold or purchased under the Rule 10b5-1 or other trading arrangement.

Companies' Involvement in Rule 10b5-1 Plans

- We suggest companies add guidelines for the protection of both the insider and the company around:
  - Insider trading, through Rule 10b5-1 plans or other trading arrangements;
  - Option grant practices, particularly where the award is close in time to the release of material nonpublic information; and
  - Incorporating the newly required disclosures into their disclosure controls and procedures.
  - Any existing plans should be reviewed to determine how they will be categorized under the new rule.

New Conditions for Rule 10b5-1 Affirmative Defense

- Cooling-off period
- Certification
- Restrictions on multiple, overlapping plans
- Restrictions on single-trade plans (no more than one in a consecutive 12-month period)
- Expanded good faith condition

Insider Trading – Insider Trading Policies

- Key components of Insider Trading Policies
  - Blackout periods – periods of time when certain employees are not permitted to buy or sell securities of the Company.
    - Earnings – blackout period begins on the first business day of the last full week of the month preceding the end of a fiscal period and ends two market trading days following release of financial results for such fiscal period. Applies to all directors, Section 16 officers and other individuals designated by the CFO from time to time.
    - Event-specific – blackout periods may be imposed from time to time when warranted (e.g., involvement in a material transaction, etc.). Such an event would include the period leading up to an announcement of a business combination.
  - Transactions under company benefit plans
  - Rule 10b5-1 plans
  - Pre-clearance procedures

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Regulation FD

Regulation FD

- Regulation FD is an SEC regulation that prohibits public companies from making selective disclosure of material nonpublic information before such information is made public.
- Regulation FD was established in response to the practice where companies provided analysts and selected institutional investors information *before* it was released to the public.
- If CEO, CFO, IR or other Company spokesperson discloses material information to brokers, securities analysts or shareholders, such information must be publicly announced to "level the playing field."
  - *Exception:* Where recipient agrees to hold information confidential OR recipient owes the Company a "duty of trust or confidence"— *e.g.*, attorneys, investment bankers, or auditors.

Regulation FD

- Regulation FD provides that:
  - No company *or any person acting on its behalf* may:
  - Disclose *material nonpublic information* to either:
    - *Market professionals* or
    - *Securityholders who it is reasonably foreseeable would trade on the basis of the information.*
  - Unless such information is made public *simultaneously*, or in the case of an unintentional disclosure, made public *promptly*.

Regulation FD – Material Nonpublic Information

- Regulation FD does not define "material."
  - Information is considered "**material**" if there is substantial likelihood that a reasonable investor would consider the information important or it would significantly change the mix of available information.
  - Information is considered "**nonpublic**" if it is not available to investors generally.
- Have a good Reg. FD Policy to govern conduct

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