

# RECENT DEVELOPMENTS FOR DIRECTORS

A Quarterly Update for US Public Companies from the Public Company Representation Practice

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## SEC Amends Trading Plan Rule, Requires More Disclosure for Insider Trading

Amended Rule 10b5-1 for trading plans takes effect on February 27, 2023. The amended rule adds new conditions to the affirmative defense against insider trading, including a mandatory cooling-off period and limits on overlapping plans. The SEC has also mandated extensive new quarterly disclosures regarding the use of plans by directors and officers and annual disclosures by companies of their insider trading policies and equity-based awards made shortly before or after disclosure of material information. This Latham [Client Alert](#) summarizes the new rules and answers FAQs on their implementation.

## Companies Bolster Controls to Mitigate Clawback Risk

The SEC's [new clawback rule](#) requires stock exchanges to adopt listing rules by October 2023 requiring companies to maintain policies to recover from officers incentive-based compensation after an accounting restatement. In response, companies are carefully considering resource allocations in their internal control over financial reporting, including staffing levels in accounting and financial reporting.

Audit committees are reviewing resource levels to mitigate risk in financial reporting. Compensation committees are collaborating in that effort, based on their responsibility for potential implementation of compensation clawbacks after a restatement.

## Companies Take Steps for Strategic Preparedness

Companies are taking proactive steps to enhance their defense readiness, including:

- Refreshing “on the shelf” shareholder rights plan and expanding disclosure of director expertise in key risk areas to bolster activism defense
- Ensuring that voting disclosures align with corporate charter to avoid plaintiff demand letters
- Updating indemnification agreements based on current trends and plaintiff tactics
- Reviewing D&O insurance coverage levels based on enhanced litigation risks

## Delaware Oversight Claims Have “Bloomed Like Dandelions”

As oversight-failure claims proliferate, companies are enhancing risk monitoring, regulatory compliance, and oversight systems. Oversight-failure claims under *Caremark* have “bloomed like dandelions after a warm spring rain,” the Delaware Chancery recently noted, and it more recently allowed an oversight-failure claim against a corporate officer to proceed for the first time. In response, companies are enhancing committee responsibilities, enhancing board-level risk reporting, and ensuring that board minutes memorialize risk reporting and oversight.

## Antitrust Regulators Target Director Interlocks

New antitrust regulatory scrutiny has resulted in resignations by seven directors from five public company boards due to director service on a competitor's board. In response, companies have enhanced their vetting of both new and incumbent directors, especially when expanding a business line, closing a major transaction, or disclosing director biographies. Companies have also updated their annual director questionnaires and pre-clearance procedures before their directors or officers join other boards.