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Memorandum

SEC Amends Rules Relating to Rule 10b5-1 Trading Plans and Imposes Additional Disclosure Requirements

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On December 14, 2022, the Securities and Exchange Commission adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act") and added related new disclosure requirements in an effort to address concerns about perceived abuse of the rule and to impose additional disclosure requirements on issuers. Notably, the vote adopting the new rules was unanimous, reflecting a general consensus on the need for Rule 10b5-1 reform. The amendments introduce new conditions to being able to utilize the affirmative defense against insider trading liability contained in the rule, including prescribed cooling-off periods, additional certifications, limitations on overlapping plans, limitations on single-trade plans and an amended good faith condition. We note that the new conditions other than the amended good faith condition were not applied at this time to issuer share repurchases. In addition, the new disclosure rules will, among other things, require quarterly disclosure by issuers regarding the use of 10b5-1 plans and other trading arrangements by their directors and officers and annual disclosure by issuers regarding their insider trading policies and procedures.

As part of its rulemaking, the SEC also adopted new Item 402(x) of Regulation S-K, requiring companies to provide narrative and tabular disclosure regarding their policies and practices on timing of awards of stock options and similar instruments in relation to their disclosure of material nonpublic information. The SEC also updated Rule 16a-3 under the Exchange Act to require that gifts of securities be reported on a Form 4 report within two business days of the transaction rather than subsequently on Form 5.

The final rules are anticipated to become effective in the first quarter of 2023, 60 days following publication of the adopting release in the Federal Register. Importantly, while the amendments will impact 10b5-1 plans adopted or modified on or after the effective date, the amendments will not impact plans adopted before such date unless subsequently modified. Issuers will be required to comply with the new disclosure requirements in Forms 10-Q, 10-K and 20-F and in any proxy or information statements in the first filing that covers the first full fiscal period that begins on or after April 1, 2023 (or, in the case of smaller reporting companies, on or after October 1, 2023).

The SEC's release (No. 33-11138) describing the final rules adopted by the SEC can be viewed here, and the fact sheet relating to the final rules can be viewed here.

Amendments Impacting Rule 10b5-1 Plans—New Conditions

As summarized below, the amendments add five new conditions to the availability of the Rule 10b5-1 affirmative defense.

1. Cooling-Off Periods.

If the insider is a director or officer[1] of the issuer, then no trades can be made under the plan until the later of:

(i) 90 days after the adoption or modification of the plan; and

(ii) two business days following the disclosure of the issuer's financial results in a periodic report (Forms 10-K or 10-Q) for the fiscal quarter in which the plan was adopted or modified, subject to a maximum cooling-off period of 120 days.

To the extent that 10b5-1 plans are adopted during customary quarterly window periods, we anticipate that the required cooling-off period generally will be 90 days. For plans adopted in the fourth fiscal quarter, however, given the later deadline for filing of a company's Form 10-K, it is possible that the cooling-off period would need to be extended pursuant to the second part of the rule.

If the insider is a person other than the issuer, director or officer, no trades can be made under the plan until 30 days after the adoption or modification of the plan.

Interestingly, while the SEC initially proposed that 10b5-1 plans entered into by issuers be subject to a 30-day cooling-off period, in its final rulemaking, the SEC elected not to impose a cooling-off period for issuer 10b5-1 plans at this time but noted that further consideration of such a requirement is warranted.

Plan modifications by directors, officers and other non-issuer insiders will generally require a new cooling-off period other than for certain ministerial and non-material changes.

2. Director and Officer Certifications.

If the insider is a director or officer of the issuer, the 10b5-1 plan must include a certification by such insider stating that, on the date of the adoption of the plan, such insider is:

(i) not aware of any material nonpublic information about the security or issuer; and

(ii) adopting the plan in good faith and not as a part of a plan or scheme to evade the prohibitions of Rule 10b-5.

We note that, in practice, these representations are already required by most broker-dealers when adopting a 10b5-1 plan.

[1] "Officer" as used in the 10b5-1 amendments and new disclosure requirements has the meaning given to it in Rule 16(a)-1(f) under the Exchange Act.

3. Restrictions on Overlapping Plans.

If the insider is a person other than the issuer, such insider must not have any other 10b5-1 plan outstanding, other than pursuant to one of the exceptions listed below:

(i) Contracts with multiple broker-dealers under single plan. A series of separate contracts with different broker-dealers or other agents can be treated as a single plan if the contracts with each broker-dealer or agent, when taken as a whole, meet all of the applicable conditions of the rule.[2]

A modification of any such contract will be a modification of each other contract in such single plan. That being said, the substitution of a broker-dealer or other agent for another broker-dealer will not be considered a modification of the plan if the trade instructions remain identical.

(ii) Later-commencing plan. A later-commencing plan is permitted if it does not authorize trades to begin until after all trades under the earlier-commencing plan are completed or expire without execution. This exception is unavailable in certain circumstances if the earlier-commencing plan is terminated rather than expiring pursuant to its terms.

(iii) Plan for sell-to-cover transactions. A plan that authorizes an agent to sell only such securities as are necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award (such as restricted stock or stock appreciation rights) and does not otherwise allow the insider to exercise control over the timing of such sales is permitted.

4. Restrictions on Single Trade Plans.

If the insider is a person other than the issuer and is looking to rely on the affirmative defense for a single-trade plan[3], such insider cannot have relied on the affirmative defense for another single-trade plan within the last 12 months (*i.e.*, only one single-trade plan can benefit from the affirmative defense every 12 months).

5. Amended Good Faith Condition.

For all types of insiders, the amended good faith condition more broadly requires the insider to have acted in good faith with respect to the plan, not just in connection with entering into the plan.

[2] This exception is designed to permit a single 10b5-1 plan that covers securities held in different accounts and therefore requires multiple brokers to execute trades.

[3] A single trade plan is one that is "designed to effect" the open-market purchase or sale of the total amount of securities as a single transaction. The SEC notes that, for this purpose, a plan is "designed to effect" the purchase or sale of securities as a single transaction when the contract, instruction, or plan "has the practical effect of requiring such a result." In contrast, a plan is not designed to effect a single transaction where the plan leaves the agent discretion over whether to execute the contract, instruction, or plan as a single transaction.

Below is a table summarizing the applicability of these new Rule 10b5-1 conditions on the various types of insiders.

New Condition	Issuer	Director or Officer	Insider that is not a Director, Officer or the Issuer
Cooling-off Period	*Not Applicable*	***Applicable***	***Applicable***
Certifications in 10b5-1 Plan	*Not Applicable*	***Applicable***	*Not Applicable*
Restrictions on Overlapping Plans	*Not Applicable*	***Applicable***	***Applicable***
Restrictions on Single-Trade Plans	*Not Applicable*	***Applicable***	***Applicable***
Amended Good Faith Condition	***Applicable***	***Applicable***	***Applicable***

Additional Disclosures Requirements Regarding Rule 10b5-1 Plans and Insider Trading Policies

As part of its final rulemaking, the SEC also adopted new Item 408 of Regulation S-K that will require public companies to provide quarterly disclosures regarding their directors' and officers' 10b5-1 plans and other trading arrangements and annual disclosures regarding their insider trading policies and procedures. The annual disclosure requirement for insider trading policies and procedures will also apply to foreign private issuers pursuant to new Item 16J in Form 20-F. Further, the SEC adopted additional rules imposing new disclosure requirements for executive and director compensation regarding certain equity awards made close in time to a company's disclosure of material nonpublic information, as well as to require that gift transactions be reported on Form 4 and make other updates to Forms 4 and 5. These changes are summarized below.

1. Quarterly Reporting of Director and Officer Trading Arrangements.

Item 408(a) of Regulation S-K will require companies to disclose whether, during the company's last fiscal quarter, any director or officer had adopted or terminated any 10b5-1 plans or other pre-planned trading arrangements ("non-Rule 10b5-1 trading arrangements") relating to such company's securities. Further, companies will be required to provide a description of the material terms of the 10b5-1 plans or non-Rule 10b5-1 trading arrangements, such as:

- the name and title of the director or officer;
- the date of adoption or termination of the trading arrangement;
- the duration of the trading arrangement; and
- the aggregate number of securities to be sold or purchased under the trading arrangement.

Of note, Item 408(a) will expressly provide that terms with respect to the price at which the individual executing the 10b5-1 plan or non-Rule 10b5-1 trading arrangement is authorized to trade will not need to be disclosed. Item

408(a) will also require companies to disclose whether such trading arrangement was a 10b5-1 plan or a non-Rule 10b5-1 trading arrangement. These disclosures will be required in Forms 10-Q and 10-K.

2. Disclosure of Insider Trading Policies and Procedures.

Item 408(b) of Regulation S-K and Item 16J in Form 20-F will require companies to disclose on an annual basis whether they have adopted insider trading policies and procedures governing the purchase, sale and/or dispositions of the company's securities by directors, officers and employees, or the registrant itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations, as well as any applicable listing standards. If a company has not adopted such policies and procedures, it must explain why it has not done so. These disclosures will be required in annual reports on Forms 10-K and 20-F and proxy and information statements on Schedules 14A and 14C.

In a modification from the initial proposal, companies will not be required to provide disclosure of their policies and procedures within the body of their annual report or proxy statement. Instead, if a company has adopted insider trading policies and procedures, such company must file such policies and procedures as an exhibit to the related report. We note that this approach is in contrast with rules governing disclosure of a registrant's code of ethics pursuant to Item 406 of Regulation S-K, which allows companies to post their code of ethics on their website as an alternative.

3. Disclosure of Option Grants and Similar Equity Instruments Made Close in Time to the Release of Material Nonpublic Information.

While issuers are currently required to provide disclosure with respect to how the determination is made as to when awards are granted, the SEC adopted new Item 402(x) of Regulation S-K that will specifically require companies to provide narrative disclosure regarding their policies and practices on timing of awards of stock options and other similar option-like instruments in relation to their disclosure of material nonpublic information. This rule requirement codifies guidance contained in Release No. 33-8732A, which encouraged issuers to disclose in their Compensation Discussion and Analysis any plan or practice of timing option grants in coordination with the release of material non-public information. Item 402(x) will also require companies to provide tabular disclosure of awards made in the four business days before a periodic or current report filing that discloses material nonpublic information and ending one business day after the filing or furnishing of such report. These disclosures will be required in annual reports on Form 10-K (which allow such disclosures to be incorporated by reference from a company's proxy statement) and proxy statements on Schedule 14A.

4. Identification of Rule 10b5-1 Plan Transactions on Forms 4 and 5; Reporting Gifts on Form 4.

Forms 4 and 5 will be updated to include a new Rule 10b5-1(c) checkbox that filers would be required to check if a reported transaction is pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule

10b5-1. Filers would also need to provide the date of adoption of the 10b5-1 plan in the "Explanation of Responses" portion of the forms.

In addition, Rule 16a-3 under the Exchange Act, which previously permitted filers to report dispositions of bona fide gifts of equity securities on Form 5, will be updated to now require gifts to be reported on Form 4.

Key Takeaways and Observations

The most significant of these new changes are the amendments to Rule 10b5-1 and, in particular, the cooling-off periods and limitations on multiple overlapping plans. We expect that many insiders (particularly directors and officers) will reconsider the benefit of 10b5-1 plans due to these new limitations, including the extended cooling-off period, and instead may opt to execute more trades on a one-off basis during open trading windows.

Notably, the SEC did not adopt a cooling-off period condition for issuers in the final amendments to Rule 10b5-1, although they had included such a condition in their initial proposal. The SEC has noted, however, that they are continuing to consider whether regulatory action is needed to mitigate any risk of investor harm from the misuses of 10b5-1 plans by issuers, so there is potential for the SEC to revisit this issue in the future, particularly in light of the currently proposed rules relating more broadly to issuer share repurchases.

While many of the new disclosure requirements will not be phased in until the second half of 2023 or early 2024 (for companies with a December 31 fiscal year end), given that the new Rule 10b5-1 conditions will become effective for plans entered into or modified on or after the effective date of the new rules, we recommend that issuers review and update their existing insider trading policies and procedures as necessary to ensure they conform to the new requirements by the effective date.

Finally, in light of the new requirement under Item 402(x) to provide tabular disclosure of awards made close in time to the release of material nonpublic information, we expect that boards may elect to modify their current practices so as to grant awards outside of periods where disclosure would be required.

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