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LEGAL UPDATES AND NEWS

SEC Adopts New Requirements Regarding 10b5-1 Insider Trading Plans

On December 14, 2022, the Securities and Exchange Commission (the "SEC") approved amendments to Rule 10b5-1 regarding insider trading plans to revise the conditions that must be met for insiders to be able to use the 10b5-1 affirmative defense, including, among other things, a cooling-off period before beginning to trade under a Rule 10b5-1 plan, representations from plan participants that they are in compliance with the Rule 10b5-1 requirements and new periodic disclosure requirements for issuers and their insiders.

The new rules will become effective 60 days following their publication in the Federal Register. Generally, issuers and insiders will need to begin their compliance with the new disclosure requirements on or after April 1, 2023 (October 1, 2023 for smaller reporting companies).

10b5-1 Plans Generally

Rule 10b-5 under the Securities Exchange Act of 1934 prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security, including insider trading. Rule 10b5-1(c)(1) provides an affirmative defense to allegations of insider trading for persons who trade in an issuer's securities if the person can demonstrate, among other conditions, that before becoming aware of material non-public information, the person had: (1) entered into a binding contract to buy or sell the securities; (2) provided instructions to another person to execute the trade for the instructing person's account; or (3) adopted a written plan for trading securities. These arrangements are often referred to as "Rule 10b5-1 plans." These plans must meet certain requirements with respect to trading and be entered into in good faith.

New Requirements for Creating or Modifying a 10b5-1 Plan

Cooling-Off Periods

Under the amendments to the Rule, individual insiders (the SEC did not adopt a cooling-off period for issuers) will now be subject to a cooling-off period before trades may commence after adopting or modifying a Rule 10b5-1 plan. For an issuer's directors and Section 16 officers the cooling-off period to begin trading under a Rule 10b5-1 plan is the later of (1) 90 days following adoption or modification of the plan or (2) two business days following the disclosure, in a Quarterly Report on Form 10-Q or an Annual Report on Form 10-K (together, "Periodic Reports"), of the issuer's financial results for the fiscal quarter in which the plan was adopted or modified, but in no case can disclosure exceed 120 days following plan adoption or modification.

For persons other than an issuer's directors and Section 16 officers, the cooling-off period will be 30 days following adoption or modification of the plan.

The following types of modifications to a plan will be considered a termination of a plan and adoption of a new plan, which will trigger the cooling-off period: changes to the amount, price or timing of the purchase or sale of the securities (or a change to a written formula or algorithm, or computer program that affects the amount, price or timing of the purchase or sale of the securities) underlying a contract, instruction or written plan. The SEC clarified in its adopting release that modifications to an existing Rule 10b5-1 plan that do not change the sale or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions under a Rule 10b5-1 plan (such as an adjustment for stock splits or a change in account information) will not trigger a new cooling-off period.

Insider Representations and Acting in Good Faith

An issuer's directors and Section 16 officers will now be required to make certain representations in order to rely on Rule 10b5-1 as an affirmative defense. At the time of the adoption of a Rule 10b5-1 plan, directors and Section 16 officers must personally certify in writing in plan documents that (1) they are not aware of material non-public information about the issuer or its securities and (2) they are adopting the plan in good faith and not as part of a plan or scheme to evade the anti-fraud provisions of Rule 10b-5.

In addition, there is a new condition that requires any person who has a Rule 10b5-1 plan in place to act in good faith with respect to the plan. As an example of not complying with this requirement, the SEC stated that an insider would not be operating in good faith if he or she, while aware of material non-public information, directly or indirectly induces the issuer to publicly disclose that information in a manner that makes their trades under the Rule 10b5-1 plan more profitable (or less unprofitable). In such a scenario, notwithstanding the plan having been entered into in good faith, the insider would not be entitled to the affirmative defense.

Limitations on Multiple Plans and Single Trade Plans

Multiple, overlapping Rule 10b5-1 plans will be limited for individuals, but not issuers. Specifically, the amendments contain the general rule that multiple, overlapping plans are prohibited with the following limited exceptions:

a. An individual may enter into more than one plan with different broker-dealers or other agents and treat the plans as a single Rule 10b5-1 plan so long as, when taken as a whole, the "plan" complies with all of the Rule's requirements;
b. An individual may adopt one later-commencing plan so long as the later-commencing plan has a cooling-off period that starts when the first plan terminates; and
c. An individual may have an additional plan set up solely to sell securities as necessary to satisfy tax withholding obligations arising exclusively from the vesting of a compensatory award, otherwise known as "sell-to-cover" transactions.

In addition, an individual will be able to rely on the affirmative defense under Rule 10b5-1 for only one single-trade plan during any 12-month period, and only if the person did not adopt another single-trade plan that qualified for the affirmative defense during the preceding 12-month period. The limitation on single-trade Rule 10b5-1 plans will not apply to sell-to-cover transactions.

New Disclosure Requirements

Issuers

Issuers will now be required to disclose in each Periodic Report the use of Rule 10b5-1 plans and certain other written trading arrangements by the issuer's directors or Section 16 officers in the quarterly period preceding the filing of such report, including descriptions of certain material terms of such plans or arrangements.

Disclosure of an issuer's insider trading policies and procedures will now be required in the Annual Report on Form 10-K and proxy statement. This information can be incorporated by reference from a proxy statement into the Annual Report on Form 10-K if the proxy statement is filed within 120 days of the issuer's fiscal year end. Issuers must also file those policies and procedures as exhibits to the Annual Report on Form 10-K. If an issuer does not have insider trading policies or procedures, it must explain why.

Disclosure of an issuer's policies and practices regarding the timing of option grants, the release of material non-public information and a new table reporting on certain option awards will now be required in the Annual Report on Form 10-K and proxy statement. This information can be incorporated by reference from a proxy statement into the Annual Report on Form 10-K if the proxy statement is filed within 120 days of the issuer's fiscal year end. The new table will cover option awards made to named executive officers in the four business days before the filing of a Periodic Report or the filing or furnishing of a Current Report on Form 8-K that discloses material non-public information (including earnings information but excluding a Form 8-K that discloses only the grant of a material new option award) and ending one business day after such triggering event.

Individuals

Insiders that report on Forms 4 or 5 will be required to indicate by checkbox that a reported transaction was intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) and to disclose the date of adoption of the trading plan. The amendments also require bona fide gifts of securities that were previously permitted to be reported on Form 5 to be reported on Form 4.

Conclusion and Next Steps

While the amendments, as adopted, are less burdensome than what the SEC initially proposed and, in some instances, simply codify what was already being implemented by many issuers, insiders and brokers voluntarily, they do create many new obligations for issuers and their

directors and Section 16 officers. Issuers and insiders should review existing policies and procedures to incorporate changes that are needed to address the amendments to Rule 10b5-1, including the new disclosure requirements, cooling-off periods and policies and procedures regarding the timing of option grants. Issuers should evaluate existing disclosure controls and procedures and implement changes, as necessary, to ensure readiness for the new reporting obligations. Issuers should also alert their directors and Section 16 officers to any changes to their insider trading policies resulting from the amendments and about the new requirement to report bona fide gifts on Form 4.

As of the date of this newsletter, the amendments have not yet been published in the Federal Register, so the earliest that they would become effective is early March 2023. Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023. Issuers will be required to comply with the new disclosure requirements in Periodic Reports and in any proxy or information statements in the first filing that covers the first full fiscal period beginning on or after April 1, 2023. Issuers that are smaller reporting companies will be required to comply with the new disclosure requirements in Periodic Reports and in any proxy or information statements in the first filing that covers the first full fiscal period beginning on or after October 1, 2023.

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Please contact any of our attorneys below if you have any questions regarding the information contained in this newsletter.

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