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Effectiveness of New Rules and Disclosures Related to Rule 10b5-1 Insider Trading Plans (Update)

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Since 2000, Rule 10b5-1 plans have been widely used by officers and directors of issuers, who may regularly become aware of material nonpublic information ("**MNPI**") but still wish to purchase or, more typically, to sell shares. 10b5-1plans are also used by issuers in connection with planned purchases and sales of their securities. They provide an affirmative defense from insider trading liability for trades even when the insider is aware of MNPI, but only if certain requirements are met.

We previously reported on proposals by the Securities and Exchange Commission (the "**SEC**") to amend the rules related to this affirmative defense. On December 2022, the SEC adopted amendments to Rule 10b5-1 and new disclosure requirements aimed to protect against insider trading. The final rules became effective February 27, 2023.

The new rules do not impact any existing Rule 10b5-1 trading plans or new or modified Rule 10b5-1 trading plans entered into prior to February 27, 2023. Issuers are required to comply with the new disclosure requirements on Form 10-Q, 10-K, and 20-F and in any proxy statements in the first filing that covers the first full fiscal period that begins on or after April 1, 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. The final amendments defer by six months (or until October 1, 2023) the date of compliance with the additional disclosure requirements for smaller reporting companies ("**SRCs**").

The main issues to be aware of in the amendments, which are listed in the same order as we previously reported on, are:

1. Cooling-off Periods

There is a mandatory minimum cooling-off period between when a plan is adopted or modified and when trading may commence. Directors and officers (but not the issuers themselves) must use a cooling-off period that expires 90 days after adoption or modification of a plan or, if later, two business days after filing the Form 10-Q or Form 10-K covering the fiscal quarter in which the plan was adopted, or for Foreign Private Issuers ("**FPIs**"), in a Form 20-F or Form 6-K that discloses the issuer's financial results. In any case, this cooling-off period is subject to a maximum of 120 days.

2. Restriction of the Use of Multiple Overlapping Plans and Single-Trade Plans

Adopting more than one Rule 10b5-1 plan by persons other than the issuer, is prohibited. The amended rule's restriction on overlapping plans applies to plans for any class of securities of an issuer, not only for the same class of securities.

There are a few limitations to this restriction, including: (a) plans that authorize sell-to-cover transactions to satisfy tax withholding obligations incident to the vesting of certain equity awards, such as grants of restricted stock and restricted stock units, which can qualify for the affirmative defense of Rule 10b5-1 even if a person has another plan in place under certain circumstances; (b) a person may simultaneously maintain a successor trading plan under which trades are not scheduled to begin until completion or expiration of the predecessor plan; (c) separate

contracts with different brokers to execute trades under a single trading plan may be viewed together as one plan; and (d) issuers may adopt multiple overlapping trading plans without regard to the limitation on overlapping plans that applies to all other persons.

Sellers are also generally limited to just one "single trade" 10b5-1 plan (where all the shares covered by the plan are sold in one transaction) in any 12-month period, except for sell-to-cover arrangements.

3. D&O Certifications

Directors and Officers are required to certify they are adopting plans in good faith and not as part of a plan or scheme to evade the prohibitions of the Securities Exchange Act of 1934 (the "**Exchange Act**"), and that they are not aware of MNPI.

4. New Disclosure Requirements in Quarterly and Annual Reports

Issuers will be required to disclose the adoption, modification or termination of any Rule 10b5-1 plans in a Form 10-Q or Form 10-K, if they occurred during the quarter covered by such report. Issuers will also need to describe the material terms of such plans, such as: (a) name and title of the director or officer; (b) date of adoption or termination of the trading arrangement; (c) duration of the trading arrangement; and (d) aggregate number of securities to be sold or purchased under the trading arrangement.

For calendar year domestic issuers that are not SRCs, the new disclosure requirements will be required beginning with the Form 10-Q for the second quarter of 2023 (June 30, 2023).

FPIs will not be required to include these disclosures on Form 20-F.

5. Disclosure of Insider Trading Policies and Procedures

Issuers, including FPIs, will be required to disclose their insider trading policies and procedures in their annual reports (on Form 10-K or Form 20-F). This disclosure must be provided for the first time on Form 10-K or 20-F for fiscal years ending December 31, 2024, although it will likely be provided earlier by many issuers.

If an issuer has not adopted insider trading policies and procedures, it must explain the reasons why it has not. If the proposal is adopted, the disclosure on Form 20-F will be made by a new "Item 16J – Insider trading policies".

6. Disclosure in Section 16 filings

Additional checkboxes on Forms 4 and 5 have been added to indicate whether a reported transaction was made pursuant to a Rule 10b5-1 plan and the date that such plan was adopted.

7. Other New Disclosures

As we previously indicated, additional new disclosures will be required. Specifically, new Item 402(x) will require:

- Narrative disclosure discussing an issuer's policies and practices on the timing of awards of stock options, SARs, or similar option-like instruments in relation to the disclosure of MNPI by an issuer, including how the issuer's board of directors determines when to grant such awards.

- Narrative disclosure discussing whether, and if so, how the board or compensation committee takes MNPI into account when determining the timing and terms of an award and whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.

- Tabular disclosure regarding awards of options, SARs, and/or similar like instruments shortly before and immediately after the release of MNPI. Specifically, if during the last completed fiscal year, such instruments were awarded to a named executive officer within a period starting four business days before the filing of a periodic report on Form 10-Q or Form 10-K, or the filing or furnishing of a current report on Form 8-K disclosing MNPI, and ending one business day after a triggering event, an issuer must provide certain information concerning such award on an aggregated basis in the tabular format set forth in the new Item 402(x). This disclosure must be disclosed for the first time in the proxy statement for the 2025 Annual Meeting (or Form 10-K for fiscal year ending December 31, 2024).

In addition, the quantitative disclosure will need to be reported using Inline XBRL, and prompt disclosure of dispositions by gifts of securities by insiders on Form 4 will be required within two business days after such a gift is made.

8. Conclusion

Issuers that have adopted insider trading policies and procedures will now be required to file a copy of them as an exhibit to Forms 10-K or 20-F. Currently, issuers do not necessarily publicly disclose their insider trading programs; now, they will be required to do so, and these plans will be subject to the certifications required by Section 302 of the Sarbanes-Oxley Act of 2002. Those certifications require CEOs and CFOs to certify that the annual reports, do not, to their knowledge, contain untrue statements of material facts (or by omission). As a result, these executives may incur additional liability under Exchange Act Rule 13a-14, which provides the SEC with a cause of action against CEOs and CFOs who make false certifications.

In light of the new rules, issuers may want to expeditiously review, amend or modify policies, and provide guidance to their directors and executive officers on the new rules, as well as verify that the updated forms are used.

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