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SEC Proposes Rule Amendments Relating to Rule 10b5-1 and Insider Trading

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On December 15, the Securities and Exchange Commission (SEC) proposed rule amendments regarding the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability and enhanced disclosure requirements. Subject to certain exceptions, the current rules provide an affirmative defense to insider trading liability to corporate insiders who frequently have access to material nonpublic information, including corporate officers, directors, and issuers, for trades that are made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan. The proposed amendments would require corporate insiders to meet additional conditions to be entitled to the affirmative defense. The proposed amendments would also require enhanced disclosures with respect to issuers' insider trading policies and the adoption and termination of Rule 10b5-1 and other trading programs by directors, officers, and issuers as well as the timing of certain equity compensation awards to directors and officers.

The proposed amendments, available [here](#), will have a 45-day public comment period following publication in the Federal Register.

The proposed rule amendments are intended by the SEC to address concerns about abuse of Rule 10b5-1 to opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets. In the proposing release, the SEC referenced academic studies of Rule 10b5-1 trading arrangements that have shown that corporate insiders trading pursuant to Rule 10b5-1 consistently outperform trading of executives and directors not conducted under a Rule 10b5-1 trading arrangement. In addition, the proposed rule amendments are intended to provide greater transparency to investors with respect to the trading practices of issuers and corporate insiders.

If approved as proposed, the new and revised rules would include many significant changes, including:

Proposed Amendments to Rule 10b5-1

The proposed amendments to Rule 10b5-1 would add the following new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability:

- Rule 10b5-1 trading arrangements entered into by corporate officers or directors must include a 120-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement;

- Rule 10b5-1 trading arrangements entered into by issuers must include a 30-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement;
- Officers and directors must certify, in a certification delivered to the issuer, that they are not aware of material nonpublic information about the issuer or the security when adopting a new or modified trading arrangement;
- The affirmative defense under Rule 10b5-1(c)(1) does not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities;
- Rule 10b5-1 trading arrangements to execute a single trade are limited to one plan per 12 month period; and
- Rule 10b5-1 trading arrangements must be entered into and operated in good faith.

Enhanced Disclosure

The proposed amendments would create new Item 408 under Regulation S-K and corresponding amendments to Forms 10-Q and 10-K, new Item 16J to Form 20-F, and amendments to Forms 4 and 5. Specifically, the proposed amendments regarding Rule 10b5-1 trading arrangements, option grants, and issuer insider trading policies and procedures, would require:

- An issuer to disclose in its annual report whether or not (and if not, provide reasons) the issuer has adopted insider trading policies and procedures. Additionally, issuers would be required to disclose their insider trading policies and procedures, if they have adopted such policies and procedures;
- An issuer to disclose in its annual report its option grant policies and practices, and to provide tabular disclosure showing grants made within 14 days of the release of material nonpublic information and the market price of the underlying securities on the trading day before and after the release of such information;
- An issuer to disclose in its quarterly reports the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers, and issuers, and the terms of such trading arrangements; and
- Section 16 officers and directors to disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement.

In addition, the proposed rules would require Section 16 officers and directors to disclose promptly bona fide gifts of securities on Form 4 (rather than being allowed to defer reporting until a Form 5 is due).

Inline XBRL Tagging Requirement

The proposed amendments would also require issuers to tag the information specified by Item 408 in Inline XBRL

in accordance with Rule 405 of Registration S-T and the EDGAR Filer Manual. The proposed structured data requirement is consistent with the SEC's recent adoptions regarding Inline XBRL requirements to improve the quality and usability of data for investors.

If adopted, issuers should revise their insider trading policies to address the changes to Rule 10b5-1 plan requirements and should review and update their disclosure controls and procedures to ensure that they are able to timely comply with the enhanced disclosure requirements regarding Rule 10b5-1 trading arrangements, option grants, and issuer insider trading policies and procedures. Section 16 officers and directors should also familiarize themselves with the new Form 4 and Form 5 filing requirements.

The proposed rule amendments currently have the support to pass with all five Commissioners issuing statements supporting the proposed rule amendments. One Commissioner noted that the proposed rules will close what they consider to be gaps in the current Rule 10b5-1 construct. Another Commissioner stated that the proposed rule amendments seek "to curb potential abuses of our rules and enhance transparency for investors, while not unduly restricting issuer and individual trading in a company's securities for foreseeable, appropriate purposes."

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