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SEC Proposes Amendments Relating to Rule 10b5-1 Trading Plans and Related Disclosures

In January 2022, the Securities and Exchange Commission ("SEC") proposed amendments[1] to Rule 10b5-1 under the Securities Exchange Act of 1934 ("Exchange Act") to enhance disclosure requirements and investor protections against insider trading. The proposed amendments were largely expected and aligned with the recommendations issued by the Investor Advisory Committee in September 2021. In particular, the proposed amendments to Rule 10b5-1 would update the requirements needed to assert the affirmative defense provided in the rule, including imposing a cooling-off period, imposing certain certification requirements, prohibiting overlapping Rule 10b5-1(c)(1) trading plans ("10b5-1 plans"), limiting single-trade plans to one trading plan per 12-month period, and expanding the "good faith" requirement. The proposed amendments also would require more comprehensive disclosure about issuers' insider trading policies and procedures, and their practices regarding the timing of option grants.

I. Additional Conditions to Rule 10b5-1 Affirmative Defense

Cooling-off period. Currently, a trader could adopt a 10b5-1 plan and execute a trade under the plan on the same day. Commentators have suggested that a cooling-off period would reduce the risk that a trader could benefit from any material nonpublic information of which they may have been aware at the time the 10b5-1 plan was adopted. The amendments accordingly propose a minimum 120-day cooling-off period after the date of adoption of any 10b5-1 plan by a director or officer (as defined under Section 16 of the Exchange Act), and a minimum 30-day cooling-off period after the date of adoption of any 10b5-1 plan by an issuer. A cooling-off period of 120 days is significantly longer than typically seen in 10b5-1 plans established by even conservative issuers. Many issuers would need to adjust their policies should these amendments be adopted. In addition, directors and officers looking to use 10b5-1 plans for financial, estate, or tax planning purposes would need to plan well in advance.

In addition, the proposed amendments would clarify that a "modification" of an existing 10b5-1 plan, including cancelling one or more trades, would be deemed equivalent to terminating the plan in its entirety, which would trigger another cooling-off period before any new trades could be made.

Certification. The amendments would require Section 16 directors and officers that adopt 10b5-1 plans to furnish a written certification to the issuer that, at the time of the adoption or modification of the 10b5-1 plan, (i) they are not aware of any material nonpublic information about the issuer or its securities, and (ii) they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of the Exchange Act. A director or officer would not need to file these certifications with the SEC, but should retain a copy for a period of 10 years.

[1] The release dated January 13, 2022 replaces the version originally issued on December 15, 2021.

Limitations on multiple overlapping plans and single-trade plans. Under the proposed amendments, the affirmative defense would not be available for trades under a 10b5-1 plan when a trader maintains other outstanding plans, or subsequently enters into additional plans, for open market purchases or sales of the same class of securities. This would limit an issuer's ability to use overlapping plans to shorten the cooling-off period. In addition, the proposed amendments would limit traders to one "single trade" 10b5-1 plan during any 12-month period.

Good faith requirement. The proposed amendments would add a requirement that a 10b5-1 plan must not only be entered into in good faith, but must also be "operated" in good faith. The affirmative defense would not be available to a trader that cancels or modifies their plan in order to evade the prohibitions of the Exchange Act.

II. Enhanced Disclosures

Quarterly disclosure of trading arrangements. Under the proposed amendments, issuers would be required to disclose in a quarterly report on Form 10-Q or an annual report on Form 10-K, as applicable, whether during its most recent fiscal quarter the issuer, or any Section 16 director or officer, had adopted or terminated any contract, instruction, or written plan to purchase or sell the issuer's securities (whether or not intended to satisfy Rule 10b5-1). Issuers also would need to describe the material terms of such plans, which may include the person or entity creating the plan, the date of adoption or termination, the duration of the plan, and the aggregate amount of securities to be purchased or sold pursuant to the plan. Again, issuers should note that under the proposed rules, a modification of a 10b5-1 plan would be deemed a termination and therefore subject to disclosure.

Annual disclosure of insider trading policies and procedures. The proposed rules would require issuers to disclose whether they have adopted insider trading policies and procedures in their annual report on Form 10-K or Form 20-F, as applicable. If an issuer has not adopted such policies and procedures, it would have to explain why it has not done so. If an issuer has adopted such policies and procedures, it would be required to disclose them in its Form 10-K or Form 20-F. Notably, issuers would be required to tag these disclosures in Inline XBRL.

Disclosure on Forms 4 and 5. The proposed amendments include adding a new mandatory checkbox to Forms 4 and 5 to indicate whether a reported transaction was made pursuant to a 10b5-1 plan and, if so, the date such plan was adopted. The proposed amendments also would add an optional checkbox to Forms 4 and 5 to indicate whether a reported transaction was made pursuant to a contract, instruction, or written plan to purchase or sell the issuer's securities that is not intended to satisfy Rule 10b5-1.

Annual disclosure of option grant policies and practices. The proposed rules would require issuers to provide tabular disclosure of: (i) any option awards granted within 14 calendar days before or after the filing of a periodic report, an issuer share repurchase, or the filing or furnishing of a current report on Form 8-K that contains material nonpublic information, and (ii) the market price of the underlying securities on the trading day before and the trading day after disclosure of the material nonpublic information. In addition, the proposed rules would require narrative disclosure of an issuer's option grant policies and practices regarding the timing of option grants and the release of material nonpublic information. Such disclosure would be provided in an annual report on Form 10-K, and issuers would be required to tag such information in Inline XBRL.

Form 4 reporting of "bona fide" gifts. Currently, Section 16 reporting persons are required to report any "bona fide" gift of registered equity securities on Form 5 within 45 days after the issuer's fiscal year end, thereby permitting issuers to report "bona fide" gifts more than one year after the date of the gift. To address this time lag, the proposed amendments would require reporting of such gifts on Form 4 before the end of the second business day following the date of execution of the transaction.

III. Conclusion

The changes to Rule 10b5-1, if adopted as proposed, could have a significant impact on issuers and their directors and officers. While the proposals are being finalized, companies should assess the likely impact of the changes on their existing share repurchase programs being effected using 10b5-1 plans, as well as on their insider trading policies, and should work with their directors and officers to create solutions that would satisfy the new rules while achieving their individual liquidity goals. The proposed amendments were published in the *Federal Register* on February 15, and the comment period is due to expire on April 1, 2022.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Kimberly C. Petillo-Décossard (partner) at 212.701.3265 or kpetillo-decossard@cahill.com; Glenn J. Waldrip, Jr. (partner) at 212.701.3110 or gwaldrip@cahill.com; Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or Alexandra L. McIntire (associate) at 212.701.3575 or amcintire@cahill.com; or email publications@cahill.com.