Cahill

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# SEC Adopts Final Amendments Relating to Rule 10b5-1 Trading Plans and Related Disclosures

**In December 2022, the Securities and Exchange Commission ("SEC") unanimously voted to adopt final amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 ("Exchange Act") to enhance disclosure requirements relating to, and investor protections against, insider trading. The final amendments largely aligned with the amendments as originally proposed by the SEC in January 2022. In particular, the final amendments to Rule 10b5-1 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 final amendments also require more comprehensive disclosure about issuers' insider trading policies and procedures, and their practices regarding the timing of option grants.**

## 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 final amendments accordingly impose a cooling-off period for directors and officers (as defined under Section 16 of the Exchange Act ("Section 16")), with trading under a 10b5-1 plan not to commence until the later of (1) 90 days after the adoption of the 10b5-1 plan or (2) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K covering the fiscal quarter in which the plan was adopted or, for foreign private issuers, in a Form 20-F or Form 6-K that discloses the issuer's financial results. The final amendments further provide that in any event, the cooling-off period is subject to a maximum of 120 days after adoption of the plan. The final amendments also require a cooling-off period of 30 days for persons other than directors, officers or the issuer. The SEC is not adopting a cooling-off period for issuers at this time.

In addition, the final amendments provide that a modification of an existing 10b5-1 plan that changes the sales or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions under the plan 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.

In light of the final amendments, directors and officers looking to use 10b5-1 plans for financial, estate, or tax planning purposes will need to plan well in advance.

### Certification

The final amendments require any director or officer (as determined in accordance with Section 16) that adopts a 10b5-1 plan to include a representation in the plan 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.

### Limitations on multiple overlapping plans and single-trade plans

Under the final amendments, the affirmative defense is not 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 any class of securities of the issuer. In addition, the final amendments limit traders to one "single trade" 10b5-1 plan during any 12-month period. These limitations do not apply to the issuer, and the final amendments provide exceptions for, among other things, certain tax covering transactions.

### Good faith requirement

The final amendments add a requirement that the person who entered into the 10b5-1 plan "has acted in good faith with respect to" the plan. 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.

## Enhanced Disclosures

### Quarterly disclosure of trading arrangements[1]

Under the final amendments, issuers must 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 any director or Section 16 officer 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 must describe the material terms of such plans, other than terms with respect to the price at which the individual executing the respective trading arrangement is authorized to trade. Such terms must 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 final 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 final rules 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 must explain why it has not done so. If an issuer has adopted such policies and procedures, it must file a copy of such policies and procedures as an exhibit to its Form 10-K or Form 20-F. Notably, issuers are required to tag these disclosures in Inline XBRL.

[1] These disclosure requirements do not apply to foreign private issuers ("FPIs").

### Disclosure on Forms 4 and 5

The final amendments add a new mandatory checkbox to Forms 4 and 5 to indicate whether a reported transaction was made pursuant to a plan that is "intended to satisfy the affirmative defense conditions" of Rule 10b5-1(c) and, if so, the date such plan was adopted.

### Annual disclosure of option grant policies and practices[2]

The final rules require issuers to provide tabular disclosure of: (i) any option and stock appreciation right awards granted to a named executive officer during the period beginning four (4) business days before and ending one (1) business day after the filing or furnishing of a current report on Form 8-K that contains material nonpublic information or the filing of a periodic report on Form 10-Q or Form 10-K (each, a "triggering event"), and (ii) the percentage change in the closing market price of the underlying securities between the trading day ending immediately before and the trading day beginning immediately after the triggering event. In addition, the final rules 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 must be provided in an annual report on Form 10-K, and issuers must tag such information in Inline XBRL.

### Form 4 reporting of "bona fide" gifts

Currently, persons required to file reports under Section 16 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 up to more than one year after the date of the gift. To address this time lag, the final amendments require reporting of such gifts on Form 4 before the end of the second business day following the date of the gift.

## Conclusion

The changes to Rule 10b5-1 could have a significant impact on issuers and their directors and officers. Companies should assess the 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 satisfy the new rules while achieving their individual liquidity goals.

The final rules will become effective 60 days following publication of the adopting release in the *Federal Register*. 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 Exchange Act periodic reports on 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. The final amendments defer by six months the date of compliance with the additional disclosure requirements for smaller reporting companies.

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[2] These disclosure requirements do not apply to FPIs.

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; or Sarah L. Hernandez (attorney) at 212.701.3231 or shernandez@cahill.com; or email publications@cahill.com.