On December 14, 2022, the U.S. Securities and Exchange Commission (“SEC”) adopted final rules (1) adding new conditions applicable to Rule 10b5-1 trading plans, (2) requiring disclosure of insider trading policies and procedures and the adoption, modification or termination of Rule 10b5-1 trading plans by directors and Section 16 officers, (3) amending disclosure requirements for equity compensation made to named executive officers close in time to an issuer’s disclosure of material nonpublic information and (4) amending Forms 4 and 5 to require reporting persons to identify transactions made pursuant to a Rule 10b5-1 trading plan and disclose all gifts of equity securities on Form 4.

Timing of Effectiveness of the Final Rules

General; Grandfathered Rule 10b5-1 Trading Plans

The final rules go into effect 60 days after the date of publication in the Federal Register. After such date, any new or amended Rule 10b5-1 trading plan must comply with the requirements of the final rules.

However, the final rules will not apply to existing Rule 10b5-1 trading plans entered into before the effective date of the final rules. Plans entered into before the effective date but that are subsequently amended to change the amount, price or timing of transactions under the plan after the effective date will be treated as the adoption of a new plan and will need to comply with the final rules.

Phase-in Period for SEC Filings:

- **Section 16 persons** are required to comply with the amendments to Form 4 and Form 5 starting with reports filed on or after April 1, 2023.
Smaller reporting company issuers are required to comply with the disclosure requirements described below in periodic reports on Form 10-Q, 10-K and 20-F and in any proxy or information statement starting with the first filing that covers the first full fiscal period that begins on or after October 1, 2023 (i.e., the fiscal 2023 Form 10-K for a company with a December 31 fiscal year end).

All other issuers are required to comply with the disclosure requirements described below in periodic reports on Form 10-Q, 10-K and 20-F and in any proxy or information statement starting with the first filing that covers the first full fiscal period that begins on or after April 1, 2023 (i.e., the second quarter Form 10-Q for a company with a December 31 fiscal year end).

Background

Since 2000, Rule 10b5-1 has established affirmative defenses to Section 10(b) insider trading liability when a person adopts a contract, instruction or plan for the trading of securities at a time when such person was not aware of material nonpublic information. The SEC recognizes that insider trading and the misuse of material nonpublic information by corporate insiders harms individual investors and damages markets by undermining market integrity. Since its adoption in 2000, courts, Congress, and market participants have voiced concern that Rule 10b5-1, in its current form, was not sufficient to prevent corporate insiders from opportunistically trading securities on the basis of material nonpublic information such as allowing corporate insiders to adopt multiple, overlapping plans and subsequently selectively allowing trading under only the plans that provide the most advantageous result. More recently and before the adoption of these final rules, SEC Chair Gary Gensler also shared his concerns in certain public statements.

In light of such activity, the SEC adopted the following amendments and rules it believes are intended to improve investor confidence and ultimately enhance liquidity and capital formation by (1) reducing the opportunities for corporate insiders to misuse Rule 10b5-1 as a means to effectively trade on material nonpublic information and (2) increasing transparency regarding Rule 10b5-1 trading plans, issuers' insider trading policies and procedures and issuers' policies and practices with respect to equity awards granted close in time to the release of material nonpublic information.

Amendments to Rule 10b5-1

The final rules add the following new conditions to the affirmative defense to insider trading pursuant to a contract, instruction or plan intended to satisfy the conditions of Rule 10b5-1 (“10b5-1 plans”):

- **Cooling-off Period**: Directors and officers (as defined in Rule 16a-1(f)) (“Section 16 officers”) must wait to begin trading under a new (or amended) 10b5-1 plan until the later of (1) 90 days after the adoption of the plan or (2) two business days following the disclosure of the issuer’s financial results in a Form 10-Q or Form 10-K (or Form 6-K or Form 20-F for a foreign private issuer) relating to the fiscal quarter in which the plan was adopted, subject to a maximum cooling-off period of 120 days after adoption of the plan. For persons other than directors, Section 16 officers or issuers, the cooling-off period is 30 days after the adoption of a 10b5-1 plan. The SEC declined to adopt a cooling-off period for issuers at this time, but noted that it is considering whether regulatory action is needed to mitigate misuses of 10b5-1 plans by issuers, such as in the share repurchase context. The final rules also provide that modifications to the amount, price or timing of the purchase or sale of securities (including modifications to written formulas or algorithms, or computer programs affecting the same)
underlying a 10b5-1 plan will constitute a termination of such plan and the adoption of a new plan, which will trigger a new cooling-off period.

**Director and Officer Certifications:** Directors and Section 16 officers must include a representation in any 10b5-1 plan certifying that at the time of adoption or modification of the 10b5-1 plan: they are (1) not aware of material nonpublic information about the issuer or its securities; and (2) adopting the 10b5-1 plan in good faith and not as scheme to evade the prohibitions of Rule 10b-5. Unlike the SEC’s proposed rules, the final rules do not require that this certification be included in a separate document presented to the issuer or retained for a period of ten years. The certification will not create an independent basis of liability under Section 10(b) and Rule 10b-5 for insider trading.

**Prohibition on Overlapping 10b5-1 Plans:** All persons, other than issuers, may not have more than one 10b5-1 plan in place at the same time. However, the final rules provide the following exceptions to the prohibition on overlapping 10b5-1 plans:

- **Integrated Contracts with Multiple Brokers:** Separate contracts with different broker-dealers or other agents may be treated as a single 10b5-1 plan if each contract, when taken as a whole, meets the applicable conditions of and remain collectively subject to the provisions of Rule 10b5-1. Pursuant to this exception, a modification to any one of these contracts will constitute a modification to each other contract. Substitution of broker-dealers or agents is not considered a modification so long as the terms of the 10b5-1 plan with respect to the amount, price or timing of the purchase or sale of securities do not change.

- **Later-Commencing Plans:** A person may maintain two separate 10b5-1 plans at the same time so long as trading under the later-commencing plan is not authorized to begin until after all trades under the earlier-commencing plan are completed or expired without execution and the plans meet all other conditions under Rule 10b5-1. However, if the earlier-commencing plan is terminated prior to its expiration date, then the cooling cooling-off period for the later-commencing plan will be deemed to commence as of the date of the termination of the earlier-commencing plan.

- **“Sell-to-Cover” Plans:** A person may enter into additional plans that only authorize qualified “sell-to-cover” transactions in order for the person to satisfy tax withholding obligations at the time an equity award, such as restricted stock or stock appreciation rights, vests and the person does not otherwise exercise control over the timing of such sales. The SEC noted that this exception does not extend to sales incident to the exercise of option awards.

**Restriction on Single-Trade Plans:** All persons, other than issuers, will only be able to rely on the Rule 10b5-1 affirmative defense for a single-trade plan once during any 12-month period. The final rules include an exception to this restriction for “sell-to-cover” plans as described above with the prohibition on overlapping plans. A “single-trade plan” is a 10b5-1 plan “designed to effect” the purchase or sale of securities as single transaction, including when the plan has the practical effect of requiring such a result. The SEC noted that a 10b5-1 plan is not a “single-trade plan” when (1) the plan leaves the person’s agent discretion over whether to execute the plan as a single transaction or (2) the plan does not leave discretion to the agent, but instead provides that the agent’s future acts will depend on events or data not known when the plan is adopted (e.g., a plan providing for certain volume of sales or
purchases at several given future stock prices) and it is reasonably foreseeable at the time the plan is adopted that it may result in multiple transactions.

- **The Good Faith Condition:** Any person who has entered into a 10b5-1 plan “has acted in good faith with respect to” the plan. This requirement now means a person must act in good faith from the time a 10b5-1 plan is adopted through the term of the plan.

The amendments to Rule 10b5-1 provide disparate treatment and applicability to different persons depending on whether a plan is adopted, modified or terminated by the issuer, a director or Section 16 officer or any other person. The matrix below illustrates which amendments are applicable to each type of person:

<table>
<thead>
<tr>
<th></th>
<th>Issuer</th>
<th>Directors and Section 16 Officers</th>
<th>Persons Other Than Issuers, Directors or Section 16 Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>90-Day Cooling-off Period*</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30-Day Cooling-off Period</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Certification</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Overlapping Plan Prohibition</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Single-Trade Plan Restriction</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Good Faith Condition</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

* Directors and Section 16 officers must wait to begin trading under a new (or amended) 10b5-1 plan until the later of (1) 90 days after the adoption of the plan or (2) two business days following the disclosure of the issuer’s financial results in a Form 10-Q or Form 10-K (or Form 6-K or Form 20-F for a foreign private issuer) relating to the fiscal quarter in which the plan was adopted, subject to a maximum cooling-off period of 120 days after adoption of the plan.

**Additional Related Disclosures**

The final rules add the following new disclosure requirements for issuers subject to the applicable phase-in period described above.

**Quarterly Reporting of Trading Arrangements**

Issuers are required to disclose in Form 10-Qs and Form 10-K (1) whether any director or Section 16 officer has adopted or terminated any 10b5-1 plan or non-Rule 10b5-1 trading arrangement during the issuer’s last fiscal quarter and (2) provide a description of the material terms of the 10b5-1 plan or non-Rule 10b5-1 trading arrangement. While issuers are not required to disclose the price at which the plans or arrangements authorize trading, other material terms, such as the name and title of the director or Section 16 officer, the date of adoption or termination of the plan, the duration of the plan, and the aggregate number of securities to be sold or purchased under the plan, are subject to mandatory disclosure. Any modification to a 10b5-1 plan by a director or Section 16 officer during the
issuer’s last fiscal period constitutes a termination of an existing plan and the subsequent adoption of a new plan thus requiring disclosure. A “non-Rule 10b5-1 trading arrangement” is defined as a trading arrangement that complies with Rule 10b5-1 prior to the effectiveness of the final rules but does not comply with the new conditions added by the final rules. The final rules do not require disclosure of the adoption or termination of 10b5-1 plans or non-Rule 10b5-1 trading arrangements by issuers.

Annual Disclosure of Insider Trading Policies

Issuers are required to disclose in Form 10-K and in proxy and information statements whether they have adopted insider trading policies and procedures governing the purchase, sale and/or other dispositions of the issuer’s securities by directors, officers and employees, or the issuer itself, or explain why they have failed to do so. Foreign private issuers will be required to make analogous disclosures in Form 20-F. While the final rule does not require disclosure of the issuer’s policies in the body of the Form 10-K or Form 20-F or proxy and information statements, issuers are required to file a copy of their insider trading policies as an exhibit to Form 10-K or Form 20-F. Issuers who already include their insider trading policies in their code of ethics and file their code of ethics as an exhibit to Form 10-K or Form 20-F may simply hyperlink to that exhibit to satisfy this disclosure.

Disclosure Regarding Option Grants

Issuers are required to include in their discussions of executive compensation in Form 10-K and in proxy and information statements their policies and practices on the timing of awards of stock options, stock appreciation rights and/or similar option-like instruments in relation to the timing of the grant of awards compared to the release of material nonpublic information. These disclosures will need to include how the board determines when to grant awards (e.g., whether awards are granted on a predetermined schedule), how the board takes material nonpublic information into account when determining the timing of awards, and whether the issuer has timed the disclosure of any material nonpublic information to affect the value of executive compensation.

Issuers are required to include in Form 10-K and in proxy and information statements the following tabular disclosure if during the last fiscal year the issuer makes any awards of stock options, stock appreciation rights and/or similar option-like instruments to named executive officers within the period that begins four business days before the filing of a periodic report or the filing or furnishing of a Form 8-K that discloses material nonpublic information and ends one business day after the filing or furnishing of such report:

| (a) Name | (b) Grant date | (c) Number of securities underlying the award | (d) Exercise price of the award ($/Sh) | (e) Grant date fair value of the award | (f) Percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of material nonpublic information and the trading day following the grant of the award |
nonpublic information and the trading day beginning immediately following the disclosure of material nonpublic information

PEO
PFO
A
B
C

A Form 8-K reporting only the grant of a material new option award under Item 5.02(e) does not trigger the new tabular disclosure. Smaller reporting companies and emerging growth companies are subject to scaled disclosure which allows them to limit the disclosures in the above table to their PEO, the two most highly compensated executive officers other than the PEO who served as executive officers as of the end of the last completed fiscal year and up to two additional individuals who would have been the most highly compensated individuals but for the fact that they were not serving as executive officers as of the end of the last completed fiscal year.

**Inline XBRL Tagging**

The new disclosures described above will be required to be tagged in Inline XBRL.

**Changes to Forms 4 and 5**

After April 1, 2023, Forms 4 and 5 will include a “check the box” requirement to indicate whether a reported transaction is pursuant to a plan that is “intended to satisfy the affirmative defense conditions” of Rule 10b5-1(c).

Additionally, after April 1, 2023, Section 16 reporting persons will be required to report bona fide gifts of equity securities on Form 4 (not Form 5) before the end of the second business day following the date of execution of the transaction. Although the Rule 10b5-1 affirmative defense is available for bona fide gifts of securities, the SEC noted that gifts of equity securities are subject to Section 10(b) insider trading liability if, when making the gift, the donor was aware of material nonpublic information and knew or was reckless in not knowing that the donee would sell the securities prior to the issuer’s disclosure of such information.

**Recommended Actions**

We expect insider trading and Rule 10b5-1 will continue to be a priority for SEC Chair Gary Gensler. Less than two months ago, the SEC charged a chief executive officer and a chief technology officer of a company with insider trading despite the executive’s claims that the trades were in compliance with purported 10b5-1 plans. In light of the final rules and the current enforcement agenda of the SEC, issuers and their directors and officers should consider the following recommended actions:
• Issuers should review and update, as necessary, their insider trading policies to comply with the new requirements of the final rules and ensure such policies are prepared appropriately for public disclosure. Such policies should include requirements for (1) directors, officers and other persons (other than the issuer) to comply with the applicable cooling-off period and (2) directors and officers to affirmatively provide notice to the issuer that they adopted, modified or terminated a 10b5-1 plan as well as provide a copy of the plan. Issuers may also choose to update D&O questionnaires to provide reminders to directors and officers of their obligation to notify the issuer and confirm if any such plans have been entered into.

• Issuers should consider training for directors and officers on the final rules and the issuer’s new or amended policies to address these rules.

• Directors and officers may want to reconsider the benefits of 10b5-1 plans due to the new conditions on such plans and instead elect to execute trades during open trading windows.

• Although existing 10b5-1 plans are not required to be amended as a result of the final rules (unless modified after the effective date of the final rules) directors, officers and other persons (other than issuers) should (1) review their existing 10b5-1 trading plans, (2) consider amending, terminating or consolidating their plans if necessary and (3) create a schedule for the adoption of future trading plans to allow for an appropriate “cooling-off” period if the director, officer or other person does not wish to have a gap between 10b5-1 plans.

• Directors and officers will need to review the form 10b5-1 plan documents typically prepared by the broker-dealer to ensure the new representation required by the final rules is included.

• Issuers should review and update their board and committee calendars to ensure that meetings and grants of awards to corporate insiders do not occur around the timed release of material nonpublic information. Issuers should also review and update or create policies regarding the timing of the granting of awards to corporate insiders.

• Directors, officers and other persons should be careful when making gifts of issuer securities when they are aware of material nonpublic information. Issuers should review how their insider trading policies apply to gifts.

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