LEGAL UPDATES

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# New Rule 10b5-1 Disclosure Requirements Prompt Issuers to Reconsider Existing Compliance

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On December 14, 2022, the Securities and Exchange Commission (SEC) adopted several amendments and new disclosure requirements to address what it viewed as potentially abusive practices associated with Rule 10b5-1 plans, grants of options and other equity instruments with similar features, and the gifting of securities. The SEC originally proposed several rule and form amendments on January 13, 2022, followed by a public comment period, leading to the adoption of the final rule with certain changes in response to the collective comments received. The SEC's full adopting release related to these rules can be found here and a related summary Fact Sheet from the SEC is available here.

Section 10(b) of the Securities Exchange Act of 1934, as amended (Exchange Act), one of the securities laws' primary antifraud provisions, makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security. . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Rule 10b5-1(c) established an affirmative defense to liability under Section 10(b) and Rule 10b-5 for insider trading, which the SEC intended "to cover situations in which a person can demonstrate that the material nonpublic information did not factor into the trading decision." To that end, this defense provides that the trading was not made on the basis of material nonpublic information if the person can demonstrate, among other things, that the trade was 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 for the trading of securities (each a "trading arrangement" and collectively "trading arrangements") adopted at a time that the person was not aware of material nonpublic information.

Pursuant to these rules, the key filings and dates are as follows:

February 27, 2023 – Rule 10b5-1 and Rule 16a-3 amendments take effect, imposing new requirements on Rule 10b5-1 trading plans entered into on or after such date (as discussed below) and requiring dispositions of securities by gift to be reported within 2 business days on Form 4.

April 1, 2023 – Amendments affecting Forms 4 and 5 take effect, including a new checkbox and trading-plan disclosure.

Forms 10-Q for Quarters beginning on or after April 1, 2023 (Q-2 2023 for calendar year non-SRC companies), or October 1, 2023, for smaller reporting companies (SRCs) (Q-4 2023 for calendar year SRCs) – Amended rules require disclosure of adoption, modification, or termination of Rule 10b5-1 and non-Rule 10b5-1 trading plans by Directors and Officers.

Forms 10-K for fiscal years beginning on or after April 1, 2023 (non-SRCs) or October 1, 2023 (SRCs) (2024 Annual Reports filed in 2025 for calendar year companies) – Disclose whether the company has adopted insider trading policies and procedures (may be incorporated by reference from proxy statement), and file copies of such policies and procedures as an exhibit to the Form 10-K.

Annual Meeting Proxy Statements for fiscal years beginning on or after April 1, 2023 (non-SRCs) or October 1, 2023 (SRCs) (proxy statements with 2024 compensation disclosures, filed in 2025 for calendar year companies) – Discuss the company's policies and practices related to granting of options, SARs, and similar awards in close proximity to the release of material non-public information, and provide related tabular disclosures.

The SEC also elected to defer action on certain of its originally proposed disclosure requirements related to issuers' use of Rule 10b5-1 trading plans for consideration in the context of its broader updates to issuer stock repurchase disclosures, which are discussed in our related Legal Update here.

**Key Components**

**A. Cooling-Off Periods**

Under the amended rules, a Section 16 Officer—that is, a director or "officer" as defined by Rule 16a-1(f)—who adopts a new Rule 10b5-1 plan (or makes certain changes to an existing plan, as described below), cannot rely on the Rule 10b5-1 affirmative defense unless the plan provides that trading under the plan will not begin until the later of:

90 days after the adoption of the new (or modified) Rule 10b5-1 plan, or

two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for 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 (but in any event, the required cooling-off period is subject to a maximum of 120 days after adoption of the plan).

The SEC chose to impose a cooling-off period of only 30 days related to the implementation (or a covered modification) of plans adopted by persons other than directors and Section 16 Officers of the issuer. In a change from the SEC's original proposal, there is no cooling-off period for issuer repurchases implemented through Rule 10b5-1 plans.

The SEC also provided that certain types of modifications of an existing Rule 10b5-1 plan will trigger a new cooling-off period. This guidance is reflected in a new paragraph (iv) to Rule 10b5-1(c)(1), which specifically provides that a modification or change to the amount, price, or timing of the purchase or sale of the securities under a contract, instruction, or written plan as described in Rule 10b5-1(c)(1)(i)(A) (or a modification or change to a written formula, algorithm, or computer program that affects any of these) is a termination of such contract, instruction, or written plan and the adoption of a replacement, triggering a new cooling-off period. Under the amended rules, modifications that do not change the sales or purchase prices or price ranges, the amount of securities to be sold or purchased, or the timing of transactions under a Rule 10b5-1 plan (such as an adjustment for stock splits or a change in account information) will not trigger a new cooling-off period.

**B. Overlapping Plans**

The amended rules add a condition to the Rule 10b5-1(c)(1) affirmative defense that persons, other than issuers, may not have another outstanding (and may not subsequently enter into any additional) contract, instruction, or plan that would qualify for the affirmative defense for purchases or sales of any class of securities of the issuer on the open market during the same period.

For individuals who are trading under an existing plan when new liquidity needs arise, meeting those needs will typically require the modification of their existing plan, as the SEC's new limitation on multiple plans will prevent the individual from adopting an additional plan to cover the newly planned transactions. This modification in turn will likely require the individual to pause trading under the preexisting plan for the duration of the applicable cooling-off period (which, as discussed above, is longer for directors and Section 16 Officers). However, recognizing that an issuer's rank-and-file employees may have particular liquidity and diversification needs related to equity compensation awards, the SEC also provided an exception for "sell-to-cover" plans to satisfy tax obligations related to such awards (as discussed below).

The SEC also modified their original proposal by removing the reference to "same class of securities," meaning the multiple overlapping plans restriction will apply to contracts, instructions, or plans for any class of securities of the issuer. As a result, persons (other than the issuer) may only have one such contract, instruction, or plan, rather than one contract, instruction, or plan for each class of securities.

### C. Use of Multiple Brokers, Later-Commencing Plans, and Sell-to-Cover Plans

The modified rules state that a series of separate contracts with different broker-dealers or other agents acting on behalf of a person other than the issuer to execute trades thereunder may be treated as a single Rule 10b5-1(c) "plan," provided that the contracts with each broker-dealer or other agent, when taken together as a whole, meet all of the applicable conditions of and remain collectively subject to the provisions of Rule 10b5-1(c)(1). In that case, a modification of any one of such contracts will be treated as a modification of each other contract or instruction constituting such single plan. Thus, for purposes of the multiple overlapping plans restriction, a series of formally distinct such contracts may be treated as a single "plan" where, when taken together, the contracts otherwise satisfy the conditions of the rule. Additionally, if it becomes necessary to replace one broker-dealer or other agent executing trades under a Rule 10b5-1(c) plan with another during the term of the plan (such as moving an account to a new financial institution), this won't create a "modification" if the purchase or sale instructions for the substituted broker-dealer or agent remain identical—including with respect to prices, transaction dates, and amounts of securities to be purchased or sold.

The amended rules regarding overlapping plans also permit persons (other than the issuer) to maintain two separate Rule 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 expire without execution. This provision would not be available for the later-commencing plan, however, if the first trade under the later-commencing plan is scheduled to begin during the "effective cooling-off period" (which the SEC characterized as the cooling-off period that would be applicable to the later-commencing plan if its date of adoption were deemed to be the date of termination of the earlier-commencing plan). Both plans must meet all other conditions of the affirmative defense, including the applicable cooling-off period.

#### *The Sell-to-Cover Exception*

The SEC also adopted a modification for plans authorizing certain "sell-to-cover" transactions, in which an insider instructs their agent to sell securities in order to satisfy tax withholding obligations at the time an equity award vests. Under this modification, an insider will not lose the benefit of the affirmative defense with respect to an otherwise eligible Rule 10b5-1 plan if the insider has in place another plan that would qualify for the affirmative defense, so long as the additional plan or plans only authorize qualified sell-to-cover transactions – that is, the agent is authorized to sell only the

amount of securities needed to satisfy tax withholding obligations connected to the vesting of a compensatory award such as restricted stock or stock appreciation right, and the insider does not otherwise exercise control over the timing of the sale. The SEC decided not to allow separate sell-to-cover plans related to the exercise of option awards, fearing these presented too great an opportunity for speculative abuse. However, the SEC noted that sales to cover tax withholding obligations incident to option exercises could be covered by instructions included in a single plan along with instructions to sell based on other variables, provided all other conditions of the affirmative defense, including applicable cooling-off periods, were satisfied.

### D. Single Trade Plans

The amended rules also limit the use of "single-trade plans," providing that if a contract, instruction, or plan is designed to effect the open-market purchase or sale of the total amount of securities covered by the plan in a single transaction, the contract, instruction, or plan will not receive the benefit of the affirmative defense unless:

the person who entered into the contract, instruction, or plan has not, during the prior 12-month period, adopted another contract, instruction, or plan that was designed to effect the open-market purchase or sale of the total amount of securities subject to that plan in a single transaction; and

such other contract, instruction, or plan in fact was eligible to receive the affirmative defense.

As with the restriction on the use of multiple overlapping plans, the SEC's final rule applies this limitation to the Rule 10b5-1 plans of all persons other than the issuer. Accordingly, any person other than the issuer will be able to rely on the Rule 10b5-1(c)(1)(ii) affirmative defense for only one single-trade plan during any 12-month period.

Under the amended rule, a plan is "designed to effect" the purchase or sale of securities as a single transaction when the contract, instruction, or plan has the practical effect of requiring such a result. In contrast, a plan is not designed to effect the purchase or sale of shares in a single transaction where the plan leaves the person's agent discretion over whether to execute the contract, instruction, or plan as a single transaction or through multiple transactions.

The final rules also provide that this single-trade limitation will not apply to qualified sell-to-cover transactions, as described above.

### E. Good Faith Requirement and Director and Officer Certifications

The SEC's original proposal would have added a requirement that any Rule 10b5-1 plan be "operated" in good faith to the existing requirement in Rule 10b5-1(c)(1)(ii) that the plan must have been "entered into" in good faith and not as part of a plan or scheme to evade the prohibitions of the rule.

The final amendments instead added a requirement in Rule 10b5-1(c)(1)(ii) that any person who enters into the Rule 10b5-1 contract, instruction, or plan must have "acted in good faith with respect to" the contract, instruction, or plan. This final language—revised to address commenters' concerns that requiring a plan to be "operated" in good faith could be read to extend to the activities of broker-dealers or agents executing trades under the plan—is meant to clarify that the "good faith" requirement applies to activities within the control of the insider and extends the requirement throughout the duration of the plan. For example, the SEC observed that a corporate insider would not be acting in good faith if, while aware of material nonpublic information, the insider directly or indirectly induced the issuer to publicly disclose such information to make the insider's trades under a Rule 10b5-1 plan more profitable (or less unprofitable).

Rule 10b5-1(c)(1)(ii) also now requires that, as a condition to the availability of the affirmative defense for any Rule 10b5-1 plan adopted by a director or Section 16 Officer, the director or officer will be required to include a representation in the plan certifying that, at the time of the adoption of a new or modified Rule 10b5-1 plan:

they are not aware of material nonpublic information about the issuer or its securities; and

they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.

The SEC intended this requirement to reinforce awareness on the part of directors and Section 16 Officers of their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5-1 plans, and that the affirmative defense under Rule 10b5-1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws. In a departure from the SEC's original proposal, the final amendments require this certification to be included in the plan itself rather than delivered to the issuer as a separate document, and eliminate a proposed requirement for directors and Section 16 Officers to retain such certifications for a period of 10 years (since such individuals already would be expected to maintain adequate records to support reliance on the Rule 10b5-1 affirmative defense). The SEC also observed that, while covered persons could consult with legal counsel or other experts concerning the scope of "material nonpublic information" (subject to applicable confidentiality obligations), they retain personal responsibility for making a fact-based determination regarding whether they are in possession of such information.

## Disclosure Requirements

### A. New Annual Disclosure of Insider Trading Policies and Option Practices

Under the amended rules, issuers will be required to disclose whether they have adopted insider trading policies and procedures governing the purchase, sale, and other dispositions (including gifts) of their securities by directors, officers, and employees, or the issuer itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the issuer. These disclosures will be required in annual reports on Form 10-K pursuant to new Item 408(b) of Regulation S-K and, for Foreign Private Issuers, pursuant to a new Item 16J added to Form 20-F.

Issuers also will be required, pursuant to new Item 402(x) of Regulation S-K, to include in proxy and information statements on Schedules 14A and 14C (i) a discussion of their policies and practices on the timing of awards of options or similar awards in relation to their disclosure of material nonpublic information (including whether the issuer has timed the disclosure of such information for the purpose of affecting the value of executive compensation) and (ii) as discussed further below, additional tabular disclosures if any such grants have occurred during their last fiscal year within four business days of the filing of a Form 10-Q or any Form 8K that discloses material nonpublic information (other than executive compensation awards).

The SEC also amended Item 601 of Regulation S-K and Form 20-F to require issuers to file a copy of their insider trading policies and procedures as an exhibit to Forms 10-K and 20-F, respectively. If all of an issuer's insider trading policies are included in its Code of Ethics, and the issuer has elected to file a copy of its Code of Ethics as an exhibit to its annual report per Item 406 of Regulation S-K, including a hyperlink to that exhibit in the description of such policies and procedures required by new Item 408(b) would meet this requirement.

Each of the new annual narrative disclosures described above, as well as the annual proxy statement tabular disclosures described below, will be required initially in filings for the first full fiscal period beginning on or after April 1, 2023 (or October 1, 2023, for SRCs).—which This will result in such disclosures being required for the first time in annual reports and proxy statements for fiscal 2024, filed in early 2025, for calendar year issuers.

**B. New Quarterly Disclosure Requirements**

The SEC also added new Item 408(a) to Regulation S-K, requiring issuers (including SRCs) to:

disclose whether, during the issuer's last fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), any director or Section 16 Officer has adopted or terminated:

> (i) any contract, instruction or written plan for the purchase or sale of the issuer's securities that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) (a "Rule 10b5-1(c) trading arrangement"), and/or

> (ii) any written trading arrangement for the purchase or sale of securities of the registrant that meets the requirements of a non-Rule 10b5-1 trading arrangement as defined in Item 408(c) of Regulation S-K (a "non-Rule 10b5-1 trading arrangement"); and

provide a description of the material terms of the Rule 10b5-1 trading arrangement or non-Rule 10b5-1 trading arrangement other than terms with respect to the price at which the individual executing the respective trading arrangement is authorized to trade. Item 408(a) cites as examples of such disclosure (i) the name and title of the director or officer; (ii) the date of adoption or termination of the trading arrangement; (iii) the duration of the trading arrangement; and (iv) the aggregate number of securities to be sold or purchased under the trading arrangement.

The issuer also must indicate whether any such trading arrangement is a Rule 10b5-1 trading arrangement or is a "non-Rule 10b5-1 trading arrangement," which the SEC elected to subject to the same disclosure requirements out of concern that "corporate insiders may assert other defenses to liability under Section 10(b) … [and] absent this disclosure requirement, directors and officers may be more likely to choose to trade in reliance on alternative defenses to liability other than this affirmative defense in order to avoid the disclosure requirements for Rule 10b5-1 plans, as well as avoiding the other requirements of the affirmative defense." The SEC noted that any modification or change to a Rule 10b5-1 plan by a director or Section 16 Officer that falls within the scope of new Rule 10b5-1(c)(1)(iv) would also constitute the "termination" of an existing plan and the adoption of a new contract, instruction, or written plan required to be disclosed under Item 408(a). (Similar disclosure requirements also apply to the adoption or termination of non-Rule 10b5-1 trading arrangements).

In a departure from its original proposal, the SEC did not apply these disclosure requirements to Rule 10b5-1 contracts, instructions, or plans adopted or modified by issuers. Instead, the SEC elected to consider disclosures related to issuers' use of such plans in the context of its broader updates to issuer stock repurchase disclosures, which are discussed in our related Legal Update here.

### C. Annual Proxy Statement Tabular Disclosures for Options and Similar Awards

The SEC added both narrative and tabular disclosure requirements as new Item 402(x) of Regulation S-K, to provide investors with more information concerning an issuer's policies and practices concerning the timing of awards of stock options, SARs and/or similar option-like instruments in relation to the disclosure of material nonpublic information. The new narrative disclosure requirements are discussed in more detail above.

The new tabular disclosure requirements applicable to annual proxy statements provide that if stock options, stock appreciation rights, and/or similar option-like instruments were awarded to a named executive officer (NEO) during the last completed fiscal year within a period beginning 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 Form 8-K that discloses material nonpublic information (including earnings information, but excluding equity awards reported pursuant to Item 5.02(e) of Form 8-K), and ending one business day after such a filing, the issuer must provide—concerning each such award for the NEO in the tabular format set forth in the rule—the name of the NEO in the first column of the table, with the remaining columns consisting of the following information broken out for each NEO on an award-by-award basis:

The grant date of the award;

The number of securities underlying the award;

The per-share exercise price;

The grant date fair value of each award computed using the same methodology as used for the registrant's financial statements under generally accepted accounting principles; and

The percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and one trading day following the relevant disclosure of material nonpublic information.

**D. XBRL tagging**

The amended rules will require registrants to tag the information specified by new Items 402(x), 408(a), and 408(b)(1) of Regulation S-K, and new Item 16J of Form 20-F, in Inline XBRL in accordance with Rule 405 and the EDGAR Filer Manual. Registrants must comply with the Inline XBRL tagging requirements in Forms 10-Q, 10-K and 20-F, and any proxy or information statements that are required to include the Item 408 and/or Item 402(x) disclosures, beginning with the first such filing that covers the first full fiscal period beginning on or after April 1, 2023, for companies other than SRCs. SRCs will be required to provide and tag the disclosures beginning with the first such filing that covers the first full fiscal period beginning on or after October 1, 2023.

**E. Section 16 Reporting Changes**

**i. Identification of Rule 10b5-1 Transactions**

The amendments added mandatory Rule 10b5-1 checkboxes to Forms 4 and 5 as proposed, with one modification. In response to the concerns expressed by a commenter that the proposed checkbox language would have required a filer to definitively state that the reported transaction was made pursuant to the Rule 10b5-1 affirmative defense, the SEC revised the text accompanying the

checkboxes to state that a reported transaction is pursuant to a plan that is "intended to satisfy the affirmative defense conditions" of Rule 10b5-1(c).

### ii. Gift Reporting on Forms 4 and 5

The SEC amended Rule 16a-3 to require that dispositions of equity securities through bona fide gifts be reported within two business days of the transaction on Form 4 (rather than following year-end on Form 5). In doing so, the SEC cited concerns that delayed year-end reporting of gifts on Form 5 could allow reporting persons to "engage in problematic practices involving gifts of equity securities, such as making stock gifts while in possession of material nonpublic information, or backdating stock gifts in order to maximize the tax benefits associated with such gifts." The SEC also noted, however, that the affirmative defense of Rule 10b5-1(c)(1) is available for any bona fide gift of securities, including a gift that might otherwise cause the donor to be subject to liability under Section 10(b).

### What This Means to You

Issuers should evaluate their existing disclosure controls and procedures to determine what changes or enhancements may be needed to enable them to make the disclosures required under these new rules.

Issuers should evaluate their existing Insider Trading Policies in preparation for the new public disclosure requirements, and to ensure that any provisions related to the use of Rule 10b5-1 trading plans appropriately coordinate with the requirements of these new rules.

Issuers should assess the circumstances in which they and their insiders currently utilize the affirmative defense of Rule 10b5-1 plans, including ensuring that any new plans, as well as modifications to pre-existing plans adopted after the effective date of the new rules, will be structured to accommodate the new requirements (including applicable certifications and waiting periods).

Issuers may wish to offer additional training to their insiders concerning the requirements and implications of the new rules.

Issuers should update their internal Section 16 compliance practices to ensure that all affected reporting persons will remain in compliance with the new check-box and accelerated gift reporting requirements affecting Forms 4 and 5.

Issuer Compensation Committees should consider whether they need to revise their annual calendars to consider whether any options, SARs or other option-like awards are granted close in time to the release of material nonpublic information.

**Contact Us**

Husch Blackwell's Securities & Corporate Governance team will continue to monitor these changes and their implications. Should you have any questions, please do not hesitate to contact Steve Barrett, Shelby Moylan, Robert Fritsche, or your Husch Blackwell attorney.