SEC Proposes Significant Amendments Regarding 10b5-1 Trading Plans and Augmented Trading-Related Disclosure Requirements

December 16, 2021

On December 15, 2021, the U.S. Securities and Exchange Commission (the "SEC") proposed amendments to Rule 10b5-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and proposed new disclosure requirements intended to strengthen investor protections through enhanced disclosure relating to trading activity of corporate insiders and issuers. Most significantly, the proposed amendments, if adopted, would:

- add significant new conditions to the availability of the affirmative defense to insider trading liability under Rule 10b-5 under the Exchange Act for purchases and sales of securities pursuant to trading arrangements that satisfy the requirements of Rule 10b5-1(c)(1);
- create new disclosure requirements regarding:
  - the adoption, modification and termination of Rule 10b5-1 and other trading arrangements by issuers and directors and officers subject to the beneficial ownership reporting requirements of Section 16 of the Exchange Act ("Section 16 officers");
  - insider trading policies and procedures of issuers;
  - the timing of equity compensation awards to named executive officers or directors made in close proximity to the issuer's release of material, nonpublic information; and
- augment the reporting obligations under Section 16 of the Exchange Act of transactions made pursuant to a Rule 10b5-1 trading arrangement and gifts.

The key provisions of these proposed amendments are further discussed below. The full text of these proposed amendments is available here.

On December 15, 2021, the SEC also proposed new disclosure requirements intended to improve disclosures about issuer share repurchases and address information asymmetries between investors and corporate insiders. Most significantly, these proposed amendments, if adopted, would require an issuer to report on a new Form SR detailed disclosures regarding any issuer share repurchase by the end of the business day following the day on which the share repurchase is executed, and would also require enhanced periodic disclosures regarding an issuer's share repurchases. The full text of these proposed amendments is available here. Further details about the SEC's proposed issuer share repurchase disclosure requirements will be published in a separate Debevoise Update.

Background. The SEC adopted Rule 10b5-1 in August 2000. Rule 10b5-1 provides for affirmative defenses to insider trading liability under Section 10(b) and Rule 10b-5 of the Exchange Act. In particular, under Rule 10b5-1(c)(1), a person's purchase or sale of a security is not "on the basis of" material, nonpublic information if, before becoming aware of the material nonpublic information, the person had: (i) entered into a binding contract for the transaction, (ii) instructed another person to execute the trade for the instructing person's account or (iii) adopted a written plan for trading securities (each, a "Rule 10b5-1 trading arrangement"). The proposed amendments seek to address concerns that the Rule 10b5-1(c)(1) affirmative defense is being abused by issuers and corporate insiders – a priority issue for Chair Gensler that he has repeatedly highlighted since joining the SEC earlier this year.

New Conditions to Availability of Rule 10b5-1(c)(1) Affirmative Defense. The proposed amendments would add significant new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1):

- ***Cooling Off Period***. Directors and Section 16 officers would be subject to a minimum 120-day cooling-off period after the date of adoption or modification of any Rule 10b5-1 trading arrangement before any purchases or sales under the new or modified trading arrangement could commence. Issuers would be subject to a minimum 30-day cooling-off period after the date of adoption or modification of any Rule 10b5-1 trading arrangement before any purchases or sales under the new or modified trading arrangement could commence.

- ***Certification of No Material, Nonpublic Information***. Prior to the adoption or modification of a Rule 10b5-1 trading arrangement, directors and Section 16 officers would be required to promptly furnish to the issuer a written certification that, at the time of such adoption or modification, they are not aware of any material, nonpublic information about the issuer or its securities and they are adopting the trading arrangement in good faith and not as part of a plan or scheme to evade the prohibitions of Section 10(b) under the Exchange Act and Rule 10b-5.

- ***Overlapping Trading Arrangements and Single-Trade Arrangements***. The affirmative defense under Rule 10b5-1(c)(1) would not be available for any trades by a trader who has established multiple overlapping trading arrangements for open market purchases or sales of the same class of securities. For a trading arrangement designed to cover a single trade, the affirmative defense under Rule 10b5-1(c)(1) would only be available for one single-trade plan in any 12-month period.

Good Faith. A Rule 10b5-1 trading arrangement would be required to be "operated" in good faith (in addition to the current requirement that a Rule 10b5-1 trading arrangement be entered into in good faith), thereby making clear that the affirmative defense would not be available to a trader that cancels or modifies a plan in an effort to evade the protections of the rule or uses its influence to affect the timing of the announcement of material, nonpublic information in a way that benefits a planned trade under an existing trading arrangement.

Enhanced Disclosure Requirements Regarding Rule 10b5-1 Trading Arrangements. The proposed amendments would create the following new disclosure requirements:

- ***Disclosure of Trading Arrangements***. Proposed new Item 408(a) of Regulation S-K would require an issuer to disclose in its Form 10-Q or Form 10-K, as applicable, whether, during the last fiscal quarter, the issuer or any director or Section 16 officer of the issuer has adopted, modified or terminated any trading arrangement (whether or not satisfying the affirmative defense conditions of Rule 10b5-1(c)(1)) regarding (i) any of the issuer's securities, in the case of an issuer trading arrangement and (ii) equity securities of the issuer, in the case of director and Section 16 officer trading arrangements, and to provide a description of the material terms of any such trading arrangement.

- ***Disclosure of Insider Trading Policies and Procedures***. Proposed new Item 408(b) of Regulation S-K and new Item 16J to Form 20-F would require an issuer to disclose whether it has adopted insider trading policies and procedures governing the purchase, sale and other dispositions of the issuer's securities by directors, officers and employees of the issuer that are reasonably designed to promote compliance with insider trading laws, rules and regulations and any applicable listing standards. If so, the issuer would be required to disclose the policies and procedures and, if not, the issuer would be required to explain why it has not done so.

- ***Option Awards***. Proposed new paragraph (x) to Item 402 of Regulation S-K would require an issuer to include tabular disclosure of each option award (including the number of securities underlying the award, the date of grant, the grant date fair value and the option's exercise price) granted to its named executive officers or

directors within the 14 calendar days before or after the filing of a periodic report (*e.g.*, Form 10-Q or Form 10-K), an issuer share repurchase or the filing or furnishing of a current report on Form 8-K that contains material, nonpublic information. The issuer would also be required to disclose the market price of the underlying securities on the trading day before and after the filing date for the relevant periodic report or current report or issuer share repurchase, and include narrative disclosure regarding its option grant policies and practices regarding the timing of option grants and the release of material, nonpublic information. Smaller reporting companies and emerging growth companies would not be exempt from the proposed Item 402(x) disclosures but would be permitted to limit their disclosures about specific option awards to a more limited subset of individuals.

Amendments to Form 4 and Form 5. The proposed amendments would amend the reporting obligations of Section 16 officers, directors and beneficial owners of more than 10% of an issuer's registered equity securities ("Section 16 insiders") under Section 16 of the Exchange Act relating to the following transactions:

- ***Sales or Purchases Pursuant to a Trading Arrangement***. Form 4 and Form 5 would be updated to include a mandatory Rule 10b5-1 checkbox requiring filers to indicate whether a sale or purchase reported on the form was made pursuant to a Rule 10b5-1 trading arrangement. Each form reporting a trade made pursuant to a Rule 10b5-1 trading arrangement would also be required to disclose the date of adoption of such Rule 10b5-1 trading arrangement under "Explanation of Responses" and could optionally include additional relevant information about the trade. Form 4 and Form 5 would also be updated to include an optional checkbox allowing filers to indicate whether a sale or purchase reported on the form was made pursuant to a pre-planned trading arrangement that is not intended to satisfy the conditions of Rule 10b5-1(c)(1).

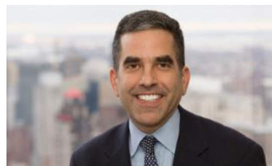
- ***Gifts***. Currently, *bona fide* gifts of equity securities by Section 16 insiders are exempt from reporting on Form 4 and, instead, may be reported on a delayed basis on Form 5, which is required to be filed within 45 days after an issuer's fiscal year end, or earlier, on a voluntary basis, on Form 4. The proposed amendments would amend Rule 16a-3 of the Exchange Act to require *bona fide* gifts of equity securities by Section 16 insiders to be reported on Form 4, which is required to be filed before the end of the second business day following the trade date.

* * *

The public comment period for all of the proposed amendments summarized above will remain open for 45 days following publication of the relevant proposing release in the Federal Register.

Please do not hesitate to contact us with any questions.

NEW YORK



Andrew J. Ceresney
aceresney@debevoise.com

Eric T. Juergens
etjuergens@debevoise.com

Matthew E. Kaplan
mekaplan@debevoise.com

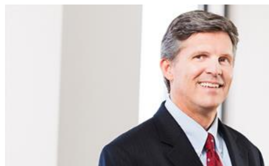
Nicholas P. Pellicani
nppellicani@debevoise.com

Steven J. Slutzky
sjslutzky@debevoise.com

Charu A. Chandrasekhar
cchandrasekhar@debevoise.com

Jonathan C. Miu
jmiu@debevoise.com

WASHINGTON, D.C.



Jonathan R. Tuttle
jrtuttle@debevoise.com