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

December 16, 2022

On December 14, 2022, the U.S. Securities and Exchange Commission (the "SEC") adopted amendments (the "Amendments") to Rule 10b5-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and new disclosure requirements relating to trading activity of corporate insiders and trading policies of issuers. Most significantly, the Amendments:

- add significant new conditions to the availability of Rule 10b5-1's affirmative defense to insider trading liability, including:
  - a cooling-off period;
  - certification of no material, nonpublic information;
  - limitations on overlapping and single trade plans;
  - a requirement to act in good faith;
- create new disclosure requirements regarding:
  - the adoption, modification and termination of Rule 10b5-1 and other trading arrangements by 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 option awards to named executive officers 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 the Amendments are further discussed below. The full text of the Amendments is available here.

These Amendments 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. Reporting companies with a calendar year fiscal year will therefore be required to comply with the new disclosure requirements on their Form 10-Q for Q2 2023.

* * *

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 deemed to be not "on the basis of" material, nonpublic information if, before becoming aware of 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 Amendments seek to address concerns that the Rule 10b5-1(c)(1) affirmative defense is abused by corporate insiders—a priority issue for Chair Gensler that he has repeatedly highlighted since joining the SEC in 2021.

New Conditions to Availability of Rule 10b5-1(c)(1) Affirmative Defense. The Amendments add significant new conditions to the availability of the affirmative defense under Rule 10b5-1(c)(1). These new conditions will become effective for trading plans that are adopted or amended after the effective date of the Amendments. Existing plans that are not amended are not required to comply with the new conditions.

- ***Mandatory Cooling-Off Period***. Directors and Section 16 officers will be subject to a cooling-off period extending to the later of: (i) 90 days after the adoption or modification of a Rule 10b5-1 trading plan; and (ii) two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K (or Form 20-F or Form 6-K for foreign private issuers) for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following adoption or modification of the plan). Persons other than directors and officers are subject to a cooling-off period of 30 days before any trading can commence under the trading arrangement or modification. Issuers will not be subject to any mandatory cooling-off period,

although the SEC noted that they believe further consideration of such requirements to issuers is warranted.

- ***Certification of No Material, Nonpublic Information***. Prior to the adoption or modification of a Rule 10b5-1 trading arrangement, directors and officers will be required to include a representation in the plan certifying that at the time of the adoption of a new or modified trading arrangement: (i) they are not aware of material, nonpublic information about the issuer or its securities; and (ii) 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) and Rule 10b-5. Issuers will not be required to make representations when adopting or modifying a Rule 10b5-1 trading arrangement.

- ***Overlapping Trading Arrangements and Single-Trade Arrangements***. The affirmative defense under Rule 10b5-1(c)(1) will not be available for any trades by a person, other than the issuer, that has established multiple overlapping trading arrangements. This condition would preclude separate, overlapping arrangements where each relates to a different class of securities of the same issuer. However, plans with separate brokers will be deemed to constitute a single plan where, taken together, the plans otherwise satisfy the conditions of Rule 10b5-1(c)(1). This condition would not restrict a person from maintaining separate trading arrangements at the same time, so long as trades under the later-commencing plan do not commence until the completion or expiration of the earlier plan (plus any effective cooling-off period, to the extent the earlier plan was terminated). An overlapping plan that provides for only "sell-to-cover" sales necessary to satisfy tax withholding obligations also will not violate this condition under certain circumstances. In addition, other than for the issuer, the affirmative defense under Rule 10b5-1(c)(1) will only be available for one plan designed to effect a single trade in any 12-month period.

- ***Good Faith***. A trader that has entered into a Rule 10b5-1 trading arrangement is required to act in good faith with respect to the trading arrangement (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 will not be available to a trader that cancels or modifies a plan in an effort to benefit their trading results, such as by using their influence to affect the timing of the announcement of material, nonpublic information, or otherwise attempting to evade the prohibitions of the rule.

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

- ***Disclosure of Trading Arrangements***. New Item 408(a) of Regulation S-K will require an issuer to disclose in its Form 10-Q or Form 10-K, as applicable, whether, during the last fiscal quarter, any director or officer of the issuer has adopted, modified or terminated (i) any trading arrangement that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)(1) and/or (ii) any written trading arrangement that meets the requirements of a "non-Rule 10b5-1 trading arrangement" (as defined in new Item 408(c)). The issuer must also provide a description of the material terms of any such trading arrangement (which need not include pricing terms) and indicate whether such trading arrangement is a Rule 10b5-1 trading arrangement or is a non-Rule 10b5-1 trading arrangement.

  The new definition of "non-Rule 10b5-1 trading arrangement" has been adopted to clarify the types of pre-planned trading arrangements that should be disclosed under Item 408(a). Under the Amendments, a trading arrangement with respect to a director or officer will be a "non-Rule 10b5-1 trading arrangement" and thus subject to the new Item 408(a) disclosure requirements, where the director or officer asserts that they adopted a written arrangement for trading the securities at a time when they were not aware of material, nonpublic information, and the trading agreement (i) specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be subsequently purchased or sold; (ii) included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which the securities were to be purchased or sold; or (iii) did not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales. This disclosure requirement is intended to capture trading plans that seek to establish an affirmative defense to liability under Section 10(b) of the Exchange Act without complying with all requirements of Rule 10b5-1.

- ***Disclosure of Insider Trading Policies and Procedures***. New Item 408(b) of Regulation S-K and new Item 16J to Form 20-F will 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, or by the issuer itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations and any applicable listing standards. If not, the issuer will be required to explain why it has not done so. These disclosures will be required in annual reports on Forms 10-K and 20-F and proxy and information statements on Schedules 14A and 14C. An issuer will also be required to file a copy of their insider trading policies and procedures as an exhibit to Forms 10-K and 20-F, respectively.

- ***Option Awards***. New Item 402(x) of Regulation S-K will require an issuer to include tabular disclosure of each option and stock appreciation right (including the number

of securities underlying the award, the date of grant, the grant date fair value and the exercise price) granted to its named executive officers in the four business days before the filing of a periodic report (e.g., Form 10-Q or Form 10-K) or the filing or furnishing of a current report on Form 8-K that contains material, nonpublic information (except for an Item 5.02(e) Form 8-K that only discloses a material new option award grant) and ending one business day after the filing or furnishing of such report. The table also discloses the percentage change in the closing price of the securities underlying the award between the trading days immediately before and after the filing date for the relevant report. New Item 402(x) will also require an issuer to provide narrative disclosure regarding its policies and practices on the timing of option grants in relation to the release of material, nonpublic information including how the board determines when to grant such awards (for example, whether such awards are granted on a predetermined schedule), whether the board takes material, nonpublic information into account when determining the timing and terms of an award and whether the registrant has timed the disclosure of material, nonpublic information for the purpose of affecting the value of executive compensation. Smaller reporting companies and emerging growth companies will not be exempt from the new Item 402(x) disclosures but will be permitted to limit their tabular disclosures about specific option awards to a more limited subset of executive officers.

The information specified in the new disclosure requirements must be tagged in Inline XBRL.

Amendments to Form 4 and Form 5. The Amendments will 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 will be updated to include a mandatory Rule 10b5-1 checkbox requiring filers to indicate whether a sale or purchase reported on the form was intended to be made pursuant to a Rule 10b5-1 trading arrangement. Each form reporting a trade made pursuant to a Rule 10b5-1 trading arrangement will 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.

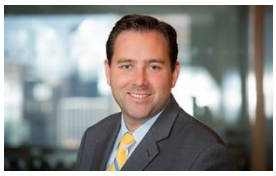
- ***Gifts***. Currently, bona fide gifts of equity securities by Section 16 insiders are exempt from reporting on Form 4 and, instead, may be reported on a delayed basis on Form 5, which is required to be filed within 45 days after an issuer's fiscal year end, or earlier, on a voluntary basis, on Form 4. The Amendments modify Rule 16a-3 of the Exchange Act to require dispositions of equity securities by Section 16 insiders that

constitute bona fide gifts to be reported on Form 4, which must be filed before the end of the second business day following the trade date.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



Morgan J. Hayes
mjhayes@debevoise.com

Eric T. Juergens
etjuergens@debevoise.com

Benjamin R. Pedersen
brpedersen@debevoise.com

Steven J. Slutzky
sjslutzky@debevoise.com

J. Michael Snypes, Jr.
jmsnypes@debevoise.com

Amy Pereira
apereira@debevoise.com

WASHINGTON, D.C.

Christopher Gallucci
cgallucci@debevoise.com

Alison E. Buckley-Serfass
aebuckleyserfass@debevoise.com

LONDON

Nicholas P. Pellicani
nppelicani@debevoise.com