Additional Disclosure and Interpretive Guidance from the SEC's Division of Corporation Finance on Insider Trading Arrangements and Policies

In December 2022, the Securities and Exchange Commission (the "SEC") adopted final amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act") to add conditions to the availability of the Rule 10b5-1 safe harbor for trading arrangements adopted at a time when an insider was not aware of material nonpublic information about the issuer ("Rule 10b5-1 Plans") and to require disclosure relating to 10b5-1 Trading Plans and issuer insider trading policies and procedures. As discussed in our previous alert, which can be found here, the amendments require certain quarterly and annual disclosures relating to trading arrangements, insider trading policies and procedures, and option grant policies and practices, in each case beginning with "the first filing that covers the first full fiscal period that begins on or after April 1, 2023." The new rules became effective on February 27, 2023.

In May 2023, the SEC staff issued Compliance and Disclosure Interpretations ("CDIs") regarding the amendments, including compliance dates for the quarterly disclosures required by Item 408(a) and the annual disclosures required by Items 402(x) and 408(b), respectively, of Regulation S-K. See SEC Exchange Act Rules Compliance and Disclosure Interpretations, Question 120.26.

On August 25, 2023, the SEC staff issued additional interpretive guidance on Rule 10b5-1 Trading Plan requirements as follows:

- Under Rule 10b5-1(c)(1)(ii)(B)(1), the required cooling-off period for directors and officers subject to Exchange Act Section 16 reporting is the later of 90 days after the adoption of the contract, instruction, or plan or "[t]wo business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the completed fiscal quarter in which the plan was adopted."
    - For purposes of the cooling-off period specified in Rule 10b5-1(c)(1)(ii)(B)(1), the date of disclosure of the issuer's financial results is the filing date of the relevant Form 10-Q or Form 10-K, and the first business day would be the next business day following the filing date.
    - To determine the filing date of the relevant form, refer to Rule 13(a)(2) of Regulation S-T. For example, if the relevant form is filed on a Monday, trading may commence under the contract, instruction, or plan on Thursday (assuming no intervening Federal holidays). In addition, whether a form is filed before or after trading opens on a given day has no bearing on the calculation. See SEC Exchange Act Rules Compliance and Disclosure Interpretations, Question 120.29.

- If a company files its Form 10-Q after 5:30 p.m. ET, is the filing date (and date of disclosure) that day, or the following business day?

    - We believe that the "filing date" for purposes of this CDI is the same as the filing date under Regulation S-T, which in this case, would be the following business day. The following hypothetical illustrates this position: if a company files its Form 10-Q report after 5:30 p.m. ET on a Friday, and the following Monday is a federal holiday, the filing date of the report and the date of disclosure of the company's financial results would be the following Tuesday, and trading may commence under the relevant contract, plan or instruction on the Friday that follows the filing date of the report.

- Even though participants elect how much to contribute to their individual 401(k) accounts, an open-market transaction conducted at the direction of the plan administrator, and not at the direction of the plan participant, to match a contribution by the participant with employer stock would not be an overlapping plan for purposes of Rule 10b5-1(c)(1)(ii)(D) that would disqualify a plan participant's reliance on Rule 10b5-1 for a concurrent open market trading plan. See SEC Exchange Act Rules Compliance and Disclosure Interpretations, Question 120.30.

Further, on the same August 25, 2023, the SEC staff also issued interpretive guidance on Rule 10b5-1 Plan-related disclosures as follows:

- The Rule 10b5-1 check box on Form 4 applies to transactions that are made pursuant to a contract, instruction, or written plan for the purchase or sale of equity securities of the issuer that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) as amended by the rules adopted in December 2022. Persons making Form 4 filings to report trades made pursuant Rule 10b5-1 Plans adopted prior to February 27, 2023 should not check the box . See SEC Exchange Act Rules Compliance and Disclosure Interpretations, Question 120.31 and SEC Exchange Act Section 16 and Related Rules and Forms, Question 135.04.

- Under Item 408(a) of Regulation S-K, Form 10-Q or 10-K disclosure regarding termination of a Rule 10b5-1 Plan or non-Rule 10b5-1 trading arrangement is not required for a plan or arrangement that ends as a result of its stated expiration or completion (e.g., the plan ends by its terms and without any new action by the insider). See SEC Regulation S-K Compliance and Disclosure Interpretations, Question 133A.01.

- The quarterly disclosure requirement of Item 408(a) applies to any Rule 10b5-1 Plan or non-Rule 10b5-1 trading arrangement covering securities in which an officer or director has a direct or indirect pecuniary interest that is reportable under Section 16 in circumstances where the officer or director has made a decision to adopt the plan or arrangement or has made a decision to terminate the plan or arrangement prior to its stated expiration or completion. See SEC Regulation S-K Compliance and Disclosure Interpretations, Question 133A.02.

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