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LATEST SEC GUIDANCE ON RULE 10B5-1 AMENDMENTS

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As discussed in our December 15, 2022 post, significant amendments to Rule 10b5-1 plan requirements took effect earlier this year. With the Justice Department announcing its first criminal prosecution challenging a Rule 10b5-1 plan, insiders are on notice that regulators are paying increased attention to use of such plans.

Earlier this month, the SEC issued several interpretations addressing some common questions arising from the amendments:

Calculating the cooling-off period. The amendments require cooling-off periods for officers and directors of the later of (x) 90 days after the adoption of the contract, instruction, or plan or (y) "[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." New CDI 120.29 explains that the first business day would be the next business day after the date of filing the relevant 10-Q or 10-K, as determined under Edgar rules.

Issuer 401(k) matching grants do not constitute an "overlapping plan". The amendments prohibit use of the 10b5-1 defense to multiple overlapping plans. New CDI 120.30 explains that, where a plan administrator directs the purchase of stock in the open market to make matching grants of company stock to participants, the election by participants to make contributions to their individual accounts would not be considered an overlapping plan. As a result, because they don't direct purchases by the plan, participants may still adopt a concurrent open market trading plan in reliance on the defense.

Form 4 checkbox only for new plans. New CDI 120.31 explains that the check box on Form 4 for trades made pursuant to 10b5-1 plans only applies to trading plans adopted on or after the February 27. 2023 effective date of the amendments.

No need to disclose plan expirations. New CDI 133A.01 explains that the requirement in S-K Item 408(a)(1) to disclose the adoption or termination of 10b5-1 plans need not include termination of a plan due to its expiration or completion.

Pecuniary interest test for disclosable insider plans. New CDI 133A.02 explains that the requirement in S-K 408(a) to disclose the adoption or termination of insider plans encompasses any plan in which an officer or director has a direct or indirect pecuniary interest reportable under Section 16.

SEC staff silent on quarterly report disclosure of absence of insider plan activity. S-K Item 408(a) calls for disclosure "whether" any director or officer has adopted or terminated any 10b5-1 or non-Rule 10b5-1 plans during the last fiscal quarter. In cases where there has been no activity by insiders, some companies are affirmatively disclosing that fact out of caution, i.e., stating "none." The staff did not include guidance addressing whether or not it views this approach as advisable in this latest round of CDIs.

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