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Trading Practices by Public Issuers and Their Insiders Under Scrutiny: SEC Proposes Tighter Rules for 10b5-1 Plans and Stock Buybacks

Insights
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Investor-Focused Proposals Would Impose Mandatory Waiting Periods for 10b5-1 Plans; Next-Day Reporting of Issuer Share Repurchases on New Form SR; and Significantly Enhanced Public Reporting and Disclosure Obligations, Including for Option Grants and Stock Gifts

On December 15, 2021, the Securities and Exchange Commission ("SEC" or "Commission") voted to adopt two sets of rule proposals designed to address the agency's stated concerns about the prevalence of certain trading practices by issuers and corporate insiders that the SEC believes may harm investors and undermine the integrity of the securities markets, including through the misuse of material nonpublic information ("MNPI").

Examples of potentially abusive practices highlighted by the SEC in the proposing releases include those associated with Rule 10b5-1 trading plans ("10b5-1 plans"), such as the opportunistic use by corporate insiders of multiple overlapping plans to selectively cancel individual trades on the basis of MNPI, commencing trades soon after the adoption of a new plan or the modification of an existing plan (e.g., within the same fiscal quarter) or terminating plans shortly after adoption.

Other "problematic practices" cited by the SEC include issuers granting stock options (and other equity awards with option-like features) to executive officers in

coordination with the release of MNPI, and insiders opportunistically timing gifts of securities while in possession of MNPI or backdating stock gifts to maximize their tax benefits. Similar concerns have been raised about issuers conducting opportunistic share repurchases (often referred to as buybacks) that may be designed to inflate executive compensation and insider share value.

The new proposals contain a package of amendments intended to reduce potentially abusive practices by strengthening investor protections and improving transparency around trading by issuers and insiders in a company's securities and related policies, procedures, and practices. The SEC intends the proposed changes to "curb potential abuses of our rules and enhance transparency for investors, while not unduly restricting issuer and individual trading in a company's securities for foreseeable, appropriate purposes."

The first set of proposals, on Rule 10b5-1 and insider trading, addresses the use of 10b5-1 plans by issuers and insiders, the timing of executive compensation option grants (and similar option-like instruments) made in close proximity in time to the release of MNPI, and the gifting of securities. The proposals would, among other changes, strengthen the rule's affirmative defense requirements and impose substantial new disclosure and reporting obligations on issuers and insiders regarding the adoption, modification, termination, and material terms of 10b5-1 and other pre-planned trading plans and insider trades made thereunder, issuer insider trading policies and procedures, option grant timing near MNPI releases and bona fide gifts.

The second set of proposals, on share repurchase disclosure, aims to reduce the potential opportunistic use of issuer share repurchases (by the issuer or its insiders), such as to manage earnings, inflate executive compensation tied to share price or boost the share price prior to insider sales, by enhancing transparency and enabling near-contemporaneous investor review of repurchases. The proposals would require significantly more-granular, more-frequent, and more-timely disclosure about issuer share repurchases, including detailed daily repurchase disclosure on a new Form SR and expanded quarterly disclosures regarding the structure of an issuer's repurchase program and its share repurchases in periodic reports.

The proposals are subject to a shorter-than-customary 45-day public comment period that will remain open through mid-February. The abbreviated timeline reflects the Commission's priority focus on these issues and its intention to move swiftly to consider commenters' views and recommendations and adopt final rules, which could take effect as early as the first half of this year.

Rule 10b5-1 and Insider Trading Proposal

The SEC adopted Rule 10b5-1 under the Securities Exchange Act of 1934 ("Exchange Act") in 2000 to help clarify when liability may arise for insider trading. The rule sets forth certain conditions, which, if met, give rise to an affirmative defense against insider trading liability for companies and corporate insiders transacting in their own companies' securities. Those conditions create a safe harbor for trading pursuant to a written plan entered into in good faith before the person trading under the plan is aware of MNPI.

Since 2000, 10b5-1 plans have proliferated, and over the years lawmakers, regulators, courts, academics, investors, and other market participants have all observed the potential for abuse. Despite repeated calls for reform, however, the rule has not been revised in over twenty years. More recently, the plans began to receive renewed scrutiny at the onset of the COVID-19 pandemic.

Last June, SEC Chair Gary Gensler, at the outset of his tenure, identified 10b5-1 trading plans and practices as one of his first rulemaking and enforcement imperatives, and an area where he urged public companies and boards to focus more of their time and attention. In public remarks, he outlined several avenues for reform intended to curb the potential for opportunistic abuse that he said "ha[s] led to real cracks in our insider trading regime," and directed the SEC staff to study and make recommendations on how the Commission might "freshen up" Rule 10b5-1 to try to reduce the risk of improper trading (see our previous client alert here). Many of the proposed changes align with and expand on his earlier statements.

Specifically, the proposed amendments relating to Rule 10b5-1 and insider trading, if adopted, would:

- add **significant new conditions to the availability of the affirmative defense** to insider trading liability under Exchange Act Rule 10b5-1(c)(1), including:
  - a **minimum 120-day cooling-off period for directors and Section 16 officers**[1] after the adoption or modification of a 10b5-1 plan before any trading can begin or resume under the plan;
  - a **minimum 30-day cooling-off period for issuers** trading in their own securities after the adoption or modification of a 10b5-1 plan before any trading can begin or resume under the plan;
  - a **requirement that directors and Section 16 officers personally certify in writing**, when adopting or modifying a 10b5-1 plan, that they are doing so in good faith and while not aware of MNPI about the issuer or the security;

    - a **prohibition on multiple overlapping 10b5-1 plans** for open-market trades in the same class of securities;
    - a **limitation on single-trade 10b5-1 plans** to one such plan during any consecutive 12-month period;
    - an **expansion of the existing good faith requirement to** apply not only to the establishment, but also to the *operation*, of 10b5-1 plans; and
- impose **substantial new disclosure and reporting obligations** applicable to issuers and insiders regarding:
    - the **adoption, modification, and termination of 10b5-1 and other pre-planned trading plans** by issuers, directors, and Section 16 officers, the **material terms** of such plans and **insider transactions** executed thereunder;
    - issuer **policies and procedures related to insider trading**;
    - issuer **policies and practices related to the timing of equity compensation awards** such as stock options, stock appreciation rights ("SARs") and similar instruments with option-like features near MNPI releases, and the **disclosure of option awards granted to named executive officers** within 14 days of issuers' release of MNPI (including earnings information) and the market price of the underlying securities on the trading day before and after the release of such information; and
    - **accelerated reporting of bona fide gifts of securities on Form 4 within 2 business days** (rather than on Form 5 within 45 days after fiscal year-end, as currently permitted).

Chair Gensler emphasized that the proposed reforms could fill "critical gaps in the SEC's insider trading regime and…help shareholders understand when and how insiders are trading in securities for which they may at times have [MNPI]."

120-Day Cooling-Off Period for Directors and Officers

There is currently no mandatory cooling-off period between when insiders or issuers adopt or modify 10b5-1 plans and when they make their first trade, though prior to the SEC's recent rulemaking focus, market practice had evolved such that practitioners would recommend, and brokers typically would require, some waiting period, typically a minimum of one to two months. The SEC proposes to establish a mandatory cooling-off period of **at least 120 days** for directors and Section 16 officers between adoption or modification of a 10b5-1 plan and the date on which trading can begin or

resume under the plan. The SEC notes that a 120-day cooling-off period would span an entire quarter, meaning that no trading could occur under a 10b5-1 plan adopted during a particular quarter until after that quarter's financial results are announced, which would largely prevent insiders from capitalizing on unreleased MNPI for the upcoming quarter.

Under the proposal, any modification or amendment to an existing plan (including the cancelation of one or more trades) is deemed equivalent to terminating the plan in its entirety and adopting a new plan, thereby restarting the applicable cooling-off period before any new trades could begin. The proposal does not limit modifications to those that are material to the plan or provide any de minimis modification exception.

30-Day Cooling-Off Period for Issuers

The SEC proposes to establish a mandatory cooling-off period of **at least 30 days** for issuers that use 10b5-1 plans in their share repurchase programs (there is often no waiting period in current practice).

Director and Officer Certification

If a director or Section 16 officer adopts or modifies a 10b5-1 plan, the proposed amendments would require that, on the date of adoption or modification, they "promptly" furnish to the issuer a written certification stating that (i) they are not aware of MNPI about the issuer or its securities and (ii) they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of the rule. Although the certification would not need to be filed with the SEC, the director or officer would be expected to retain a copy for ten years. The SEC notes that the proposed certification would not establish an independent basis for liability under the Exchange Act (though this is not explicitly stated in the proposed rule text); rather, the proposed certification requirement is intended to "underscore the certifiers' awareness of their legal obligations under the federal securities laws related to the trading in the issuer's securities." A certification would not be required where a director or officer terminates an existing 10b5-1 plan without adopting a new or modified plan.

Prohibition on Overlapping Plans

There are currently no limits on the number of plans insiders may establish and employ. Chair Gensler has observed that "[w]ith the ability to enter into multiple plans, and potentially to cancel them, insiders might mistakenly think they have a 'free option' to pick amongst favorable plans as they please." The proposed amendments would prohibit multiple overlapping 10b5-1 plans for open-market trades in the same

class of securities. Transactions where an insider acquires securities directly from the issuer, such as through participation in employee stock ownership or dividend reinvestment plans, would not be considered a prohibited overlapping plan. The SEC notes that although participation in these programs is sometimes effected through 10b5-1 plans, transactions directly with the issuer are less likely to give rise to insider trading.

Limitation on Single-Trade Plans

The proposal would limit single-trade plans (which permit only one trading event) to one such plan during any consecutive 12-month period. The SEC notes that, according to recent research, single-trade plans are consistently loss-avoiding and often precede stock price declines, which suggests that insiders using single-trade plans may be executing trades based on MNPI. The proposed limitation is intended to balance legitimate use of such plans, such as to address one-time liquidity needs, against the potential for abuse.

Expansion of Good Faith Requirement

The SEC proposes to amend the existing requirement that a 10b5-1 plan be entered into in good faith to further require that the plan also be *operated* in good faith in order to "help deter fraudulent and manipulative conduct and enhance investor protection throughout the duration of the trading [plan]." The SEC explains that this proposed amendment is intended to clarify that the affirmative defense to insider trading liability would not be available to a trader that improperly cancels or amends a plan, or uses its influence to manipulate the timing of corporate disclosures, such as by delaying or accelerating the announcement of MNPI, to benefit its trades under a plan.

Quarterly Disclosure of 10b5-1 and Other Pre-Planned Trading Plans

There are currently no mandatory disclosure requirements concerning the use of 10b5-1 plans by issuers or insiders. The SEC proposes to add a new Item 408(a) to Regulation S-K, which would require issuers to disclose on a quarterly basis in Form 10-Q and (for the fourth quarter) Form 10-K information regarding the adoption, modification, termination, and material terms (including the date of adoption, modification or termination; the duration of the plan; the aggregate amount of issuer securities to be sold or purchased under the plan; and, if applicable, the name and title of the officer or director) of a 10b5-1 *or other pre-planned trading plans (including plans not reliant on Rule 10b5-1*) by the issuer or any of its directors or Section 16 officers during the reporting quarter. The scope of non-Rule 10b5-1 plans about which disclosures are also proposed to be required is not defined, nor are any

examples provided. The proposed disclosures would be subject to the certifications by the issuer's principal executive officer and principal financial officer that are required by Section 302 of the Sarbanes-Oxley Act ("SOX") and would be required to be tagged using Inline XBRL (block text tagging of narrative disclosures, as well as detail tagging of quantitative amounts disclosed within the narrative disclosures). There is no proposed requirement that the trading plans be filed with the Commission. Item 408(a) would not apply to foreign private issuers ("FPIs") that file annual reports using Form 20-F.

Identification of 10b5-1 and Other Pre-Planned Transactions on Forms 4 and 5

The SEC proposes to amend Forms 4 and 5 to add (i) a new, mandatory checkbox that would require filers to indicate whether a reported transaction was made pursuant to a 10b5-1 plan and if so, the date of the plan's adoption (filers could voluntarily provide additional relevant information about the trade) and (ii) a second, optional checkbox that would allow filers to indicate whether a reported transaction was made pursuant to a pre-planned trading plan not reliant on Rule 10b5-1.

Annual Disclosure of Insider Trading Policies and Procedures

Issuers are currently not required to disclose the specifics of their insider trading policies or procedures. The SEC proposes to add a new Item 408(b) to Regulation S-K, which would require issuers to disclose in their annual reports on Form 10-K or Form 20-F and proxy statements whether or not (and if not, why not) they have adopted insider trading policies and procedures governing the purchase, sale or other disposition of the issuer's securities by directors, officers, employees and the issuer itself. Issuers would be required to describe such policies and procedures, if adopted (there is no proposed requirement, however, that issuers file their insider trading policy as an exhibit to an SEC filing or post it to their corporate website). The proposed disclosures would be subject to the SOX Section 302 officer certification requirements, and would be required to be tagged using Inline XBRL. FPIs would be required to provide analogous disclosure in their annual reports pursuant to a new Item 16J that would be added to the form.

The SEC notes that because insider trading policies and procedures may vary from company to company and decisions as to specific provisions of the policies and procedures are best left to the company, the proposed amendments do not specify all details that an issuer should address in its insider trading policies or prescribe any specific language that such policies must include. The SEC emphasizes, however, that the proposed Item 408(b) disclosure should include "**detailed and meaningful information from which investors can assess the sufficiency of [issuers'] insider trading policies and procedures**," such as the following:

> "[I]nvestors may find useful…information on the issuer's process for analyzing whether directors, officers, employees, or the issuer itself when conducting an open-market share repurchase have [MNPI]; the issuer's process for documenting such analyses and approving requests to purchase or sell its securities; or how the issuer enforces compliance with any such policies and procedures it may have…[and] not only policies and procedures that apply to the purchase and sale of the [issuer]'s securities, but also other dispositions of the issuer's securities where [MNPI] could be misused such as, for example, through gifts of such securities."

Where an issuer's existing code of ethics contains insider trading policies, the issuer would be permitted to cross-reference to the particular sections of its code of ethics that constitute insider trading policies and procedures. (The SEC observes, however, that codes of ethics that address insider trading issues often lack the detail necessary to assess actual practices surrounding potential insider trading.)

Annual Disclosure Regarding the Timing of Option Grants Shortly Before or After MNPI Releases

In the proposing release, the SEC expresses concern that its existing executive compensation disclosure requirements do not provide investors with adequate information regarding an issuer's policies and practices on option grants timed to precede or follow the release of MNPI. It notes, for example, that, under current executive compensation disclosure rules, option grants timed to occur immediately before the release of positive MNPI likely to result in an increase in the issuer's stock price ("spring-loading") or delayed until after the release of negative MNPI likely to result in a decrease in the issuer's stock price ("bullet-dodging") are not required to be separately identified in the required tables. As a result, "investors may not have a clear picture of the effect of an option award that is made close in time to the release of [MNPI] on the executives'…compensation and on the company's financial statements." While acknowledging that issuers may have reasons for granting these types of timed options, the SEC believes increased transparency is warranted.

Accordingly, the SEC proposes to add a new paragraph (x) to Item 402 of Regulation S-K, which would require in annual reports on Form 10-K and proxy statements:

- ***Narrative disclosure of option grant policies and practices***. Issuers would be required to disclose their policies and practices on the timing of awards of stock options, SARs and similar instruments with option-like features in relation to their disclosure of MNPI, including:

- how the board determines when to grant options (for example, whether awards are granted on a predetermined schedule);
- whether the board or compensation committee takes MNPI into account when determining the timing and terms of an award and, if so, how; and
- whether the issuer has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation.

Issuers could include the proposed narrative disclosure in their Compensation Discussion and Analysis (CD&A).

- ***Tabular disclosure of option grants near MNPI releases***. Issuers would be required to disclose in a new table each option award (including the number of securities underlying the award, the grant date, the grant date fair value computed in accordance with FASB ASC Topic 718 and the option's exercise price) granted to a named executive officer within 14 calendar days before or after the filing of a periodic report on Form 10-Q or Form 10-K, an issuer share repurchase or the filing (or furnishing) of a current report on Form 8-K containing MNPI (including earnings information), as well as the market price of the underlying securities on the trading day before release of the MNPI (for potential spring-loaded options) and the market price of the underlying securities on the trading day after release of the MNPI (for potential bullet-dodging options).

The proposed Item 402(x) disclosures are "intended to provide shareholders a full and complete picture of any spring-loaded or bullet-dodging option grants during the fiscal year," and follow on the heels of the SEC's release last November of new accounting guidance for public companies about proper recognition and disclosure of compensation costs associated with spring-loaded awards made to executives. The SEC believes information about company practices with respect to these types of awards is material to investors, especially as they consider their say-on-pay votes, approve executive compensation and vote for directors.

The proposed Item 402(x) disclosures would be required to be tagged using Inline XBRL. **Smaller reporting companies and emerging growth companies would not be exempt from these new requirements**, but could limit the named executive officers subject to the tabular disclosure consistent with the current scaled approach. FPIs would not be subject to these requirements.

Accelerated Reporting of Gifts on Form 4

Under the current rules, bona fide gifts of equity securities by Section 16 filers are exempt from reporting on Form 4 and, instead, are eligible for delayed reporting on Form 5, which is due within 45 days after the issuer's fiscal year-end. The SEC notes that the length of the Form 5 filing period, which can permit insiders to report gifts of securities more than one year after the date of the gift, may allow insiders to engage in problematic practices involving gifts of securities, such as making stock gifts while in possession of MNPI or backdating stock gifts to maximize their tax benefits. To address these concerns, the SEC proposes to require the reporting of bona fide gifts of equity securities on Form 4 before the end of the second business day following the date of execution of the transaction. Chair Gensler, applauding the improved visibility this proposal would provide into insider gifts, emphatically stated that "**charitable gifts of securities are subject to insider trading laws**."[2]

Share Repurchase Disclosure Proposal

The SEC adopted Item 703 of Regulation S-K ("Item 703") in 2003 to require quarterly disclosures about repurchases of an issuer's equity securities registered under Section 12 of the Exchange Act. In light of the growth of issuer share repurchase plans in recent years (the SEC estimates that more than 3,000 companies conducted share repurchases during the 2020 fiscal year) and longstanding concerns expressed by various stakeholders that issuers may be repurchasing securities not only for legitimate business purposes but also for opportunistic and potentially harmful reasons, such as to boost the share price prior to insider sales or to inflate executive compensation tied to share price, the SEC believes investors could benefit from reducing perceived "information asymmetries" between issuers and investors, particularly due to the timing of the current Item 703 disclosures, by "improving the quality, relevance and timeliness of information related to issuer share repurchases."

The proposed amendments thus would require significantly more-detailed, more-frequent, and more-timely disclosure about issuer share repurchases. The SEC intends the augmented disclosures to provide increased transparency to investors about "the extent of an issuer's activity in the market, including potential impacts on the issuer's share price"; "an issuer's motivation for its share repurchases, and how it is executing its purchase plan"; and "any relationship between share repurchases and executive compensation and stock sales."

Specifically, the proposed amendments relating to share repurchase disclosure, if adopted, would:

- require **detailed daily repurchase disclosure on a new Form SR**, to be furnished to (not filed with) the SEC via EDGAR ***before the end of the first business day***

following the day the issuer executes a share repurchase order;

- significantly expand the existing quarterly disclosures regarding an issuer's share repurchases required to be provided in periodic reports on Forms 10-K and 10-Q for domestic issuers (annually on Form 20-F for FPIs) by amending Item 703, including to require disclosure of the **objective or rationale for repurchases** and the **process or criteria used to determine the repurchase amounts**, as well as any **policies and procedures governing officer and director purchases or sales of the issuer's securities during the pendency of a repurchase program**; and

- require the **disclosures pursuant to Form SR and Item 703 to be tagged using Inline XBRL** (detail tagging of quantitative amounts disclosed within the tabular disclosures, and block text and detail tagging of narrative and quantitative information disclosed in the footnotes to the tables).

A comparison of the existing disclosure framework for issuer share repurchases with the proposed new requirements under Form SR and revised Item 703 follows.

Existing Disclosure Framework

Item 703 currently requires that issuers disclose on a quarterly basis in Form 10-Q and (for the fourth quarter) Form 10-K (in Form 20-F on an annual basis for FPIs), in tabular format, certain limited information about their equity share repurchases, including:

- the total number of shares purchased during the quarter on a monthly basis by class;

- the average price paid per share;

- the total number of shares purchased as part of publicly announced repurchase plans or programs; and

- the maximum number (or approximate dollar value) of shares remaining for purchase under the plans or programs.

Current Item 703 also requires footnote disclosure of the principal terms of all publicly announced repurchase plans or programs, the number of shares purchased other than though a publicly announced plan or program and the nature of the transaction.

Form SR Next-Day Reporting Requirement

The SEC proposes to create new Exchange Act Rule 13a-21 and Form SR, which would require an issuer (including an FPI) to **daily** report purchases made by or on behalf of it (or by any affiliated purchaser[3]) of shares of any class of the issuer's equity securities registered under Exchange Act Section 12. The issuer would be required to furnish Form SR to the SEC via EDGAR ***before the end of the first business day*** following the day on which the share repurchase order has been executed (which would be prior to the settlement of the trade, assuming a typical T+2 settlement).

Form SR would require the following disclosure, in tabular format, by date, for each class of securities purchased:

- identification of the class of securities purchased;
- the total number of shares purchased (whether or not pursuant to publicly announced plans or programs);
- the average price paid per share;
- the aggregate total number of shares purchased on the open market (excluding shares "purchased in tender offers, in satisfaction of the issuer's obligations upon exercise of outstanding put options issued by the issuer, or other transactions");
- the aggregate total number of shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18;[4] and
- the aggregate total number of shares purchased pursuant to a 10b5-1 plan.

Because the **information provided on Form SR would be deemed furnished to (rather than filed with) the SEC**, the issuer would not be subject to Section 18 of the Exchange Act, which imposes liability for material misstatements or omissions contained in reports and other information filed with the SEC. Nor would the information be deemed incorporated by reference into the issuer's filings under the Securities Act of 1933 ("Securities Act"), and thus the issuer would not be subject to liability under Section 11 of the Securities Act. Moreover, late submissions of Form SR would not cause the issuer to lose Form S-3 eligibility or "well-known seasoned issuer" status.

Any material errors in, or material changes to, the information previously reported on Form SR would need to be reported on an amended Form SR.

As proposed, there would be **no exemption from the Form SR reporting requirement for non-accelerated filers, smaller reporting companies or**

emerging growth companies. FPIs would have the same Form SR reporting obligations as domestic issuers.

Enhanced Periodic Disclosure Requirements

The proposed amendments also would materially expand the existing periodic disclosure obligations regarding issuer share purchases. Specifically, the SEC proposes to revise Item 703 (with corresponding changes to Form 20-F) to require an issuer to disclose:

- the **objective or rationale for the share repurchases** and the **process or criteria used to determine the repurchase amounts**;
- any **policies and procedures (including any restrictions) relating to purchases and sales of the issuer's securities by its officers and directors during the pendency of a repurchase program**;
- whether repurchases were made pursuant to a 10b5-1 plan and, if so, the date the plan was adopted or terminated; and
- whether repurchases were made in reliance on the Exchange Act Rule 10b-18 safe harbor.

The SEC additionally proposes to require that issuers **disclose if any of their Section 16 officers or directors purchased or sold shares within 10 business days before or after the announcement of an issuer share repurchase plan or program** by checking a box that appears above the share repurchase table. This proposed disclosure is intended to help identify possible opportunistic trading by insiders around the announcement of an issuer's repurchase plan, which may lead to a jump in the share price, creating a window for an advantageous trade.

The SEC believes that the proposed enhanced periodic disclosure requirements, together with the additional daily-level detail it proposes to require on Form SR, "would help investors to assess whether the issuer or its insiders are potentially engaged in self-interested or otherwise inefficient repurchases and thereby help mitigate some of the potential harms associated with issuer repurchases."

Looking Ahead

In light of Chair Gensler's sustained focus on these issues, we expect the Commission will move expeditiously, once the comment period closes in mid-February, to adopt final rules, which could take effect as early as the first half of this

year. While certain details in the proposals may change over the course of the rulemaking process, the contours are clear.

In anticipation of final rule changes and potential heightened investor scrutiny and enforcement or litigation risk—and mindful of the host of problematic practices highlighted by the SEC in the proposing releases—companies may wish to carefully review their existing 10b5-1 and other trading plan guidelines, insider trading policies and procedures (including with respect to the treatment of gifts), option grant policies and practices, and share repurchase programs and discuss with counsel whether any updates may be advisable at this time.

If you have questions or would like assistance, please contact the Gunderson Dettmer attorney with whom you regularly work or a member of the firm's public companies team.

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[1] Exchange Act Rule 16a-1(f) provides that the term "officer" "shall mean an issuer's president, principal financial officer, or principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer." 17 CFR § 240.16a-1(f).

[2] The proposing release clarifies that a "sale" of securities under the Exchange Act is not required to be "for value" and provides the following example: "[A] donor of securities violates Exchange Act Section 10(b) if the donor gifts a security of an issuer in fraudulent breach of a duty of trust and confidence when the donor was aware of [MNPI] about the security or issuer, and knew or was reckless in not knowing that the donee would sell the securities prior to the disclosure of such information."

[3] An "affiliated purchaser" is "(i) [a] person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer's securities; or (ii) [a]n affiliate who, directly or indirectly, controls the issuer's purchases of such securities…" An affiliated purchaser does not include a broker or dealer solely by reason of such broker or dealer effecting share repurchases on behalf of the issuer or for its account, or an officer or director of the issuer solely by reason of such officer or director's participation in the decision to authorize share repurchases by or on behalf of the issuer. 17 CFR § 240.10b-18(a)(3).

[4] Exchange Act Rule 10b-18 provides an issuer and its affiliated purchasers with a voluntary, non-exclusive safe harbor from liability under certain market manipulation

rules and Rule 10b-5 under the Exchange Act for issuer share repurchases conducted in accordance with the rule's manner, timing, price, and volume conditions.

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