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THE SEC'S NEW 10B5-1 RULES AND EMERGING INSIDER TRADING POLICY BEST PRACTICES

In this article, the authors explain recently adopted amendments to Rule 10b5-1 and related disclosure rules, and share insights into best practices that have emerged as companies update existing insider trading policies as a result of the new rules.

By Michael L. Arnold and Lisa M. Kohl *

On December 14, 2022, the Securities and Exchange Commission (the “SEC” or the “Commission”) adopted final rules (the “Final Rules”)¹ which add a number of new requirements to Rule 10b5-1 that significantly limit the availability of the affirmative defense provided by that rule to violations of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b5-1 thereunder. The Final Rules also include new disclosure requirements that will require public companies (1) to describe and file their policies and procedures related to insider trading (“ITP”); (2) to provide additional narrative disclosure about compensatory incentive awards in certain situations; and (3) on a quarterly basis, to disclose information about the use of Rule 10b5-1 plans and other trading arrangements by their officers and directors. The Final Rules also add a mandatory check box to Forms 4 and 5 requiring

insiders who must file those reports to indicate whether the reported transaction is pursuant to a plan intended to satisfy the Rule 10b5-1 affirmative defense and requires bona fide gifts of securities to be reported on Form 4 in accordance with that form’s filing deadline. In response to the Final Rules, many companies have taken the opportunity to revisit their ITPs, with a particular focus on a set of emerging issues and best practices.²

NEW CONDITIONS TO THE RULE 10B5-1 AFFIRMATIVE DEFENSE

The Final Rules add a number of new conditions to the Rule 10b5-1 affirmative defense, including new mandatory cooling-off periods, limits on overlapping and single-trade plans, required good faith representations, and an “acted in good faith” requirement.

¹ Insider Trading Arrangements and Related Disclosures, Release No. 34-96492 (Dec. 14, 2022). The text of the final rule and the Commission’s related adopting release (the “Adopting Release”) can be found on the SEC’s website at <https://www.sec.gov/rules/final/2022/33-11138.pdf>.

² This article focuses on the Final Rules and related best practices as they pertain to domestic companies and does not discuss how foreign private issuers are affected by the Final Rules.

* **MICHAEL L. ARNOLD** is a Partner in Cravath, Swaine & Moore LLP’s New York City office in the firm’s Corporate Governance and Board Advisory practice. **LISA M. KOHL** is Of Counsel in Cravath, Swaine & Moore LLP’s Washington, D.C. office following a 12-year career at the Securities and Exchange Commission. Lisa is admitted only in Virginia and is practicing under the supervision of D.C. Bar members. Their e-mail addresses are marnold@cravath.com and lkohl@cravath.com.

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