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SEC Proposes to Reshape the Rules for Share Repurchases, 10b5-1 Plans, Trading by Directors and Officers, and Option Grant Policies

On December 15, the Securities and Exchange Commission released for public comment a pair of proposals that, if adopted, would reshape the disclosure and corporate policy landscape with respect to issuer share buybacks, trading by corporate insiders and the use of Rule 10b5-1 plans as an affirmative defense against liability for trading on the basis of material non-public information. While released for consideration separately, the two sets of proposals are united by a common list of underlying stated concerns with respect to manipulation, information asymmetries in securities trading, and transparency.

*Issuer share repurchases*. Issuers repurchasing their shares are currently required to publish certain aggregated information regarding their repurchase activity each quarter, as well as general information regarding authorization for future share repurchases. The new proposed rules call for disclosure through SEC filings on a new dedicated form, with the filing required on the business day following any repurchases. In addition to disclosure of shares purchased and the purchase price, the issuer would need to disclose if the repurchases were designed to qualify for the Rule 10b-18 safe harbor or were pursuant to a Rule 10b5-1 plan (which would now only be available to issuers following a 30-day cooling-off period after plan adoption).

Issuers would also be required to describe their general approach to share repurchases – including their objectives, the rationale for repurchases and the criteria used to determine the number of shares repurchased. Under the proposed rules, the adoption or termination by the issuer or its insiders of any plans or other arrangements to transact in shares must also be disclosed on a quarterly basis (currently, this is not required as a bright-line disclosure matter). New disclosure would also be required as to whether any Section 16 insiders transacted in the issuer's shares within 10 business days before or after the announcement of an issuer purchase plan or program (explicitly drawing a connection between the two types of trading, despite the fact that director and officer trading is already required to be reported on a Form 4 within two business days of a trade). While not the focus of this memo, the proposals have implications for the repurchase of debt securities in addition to share repurchases; thus, issuers who may repurchase their bonds should take note of the proposals.

*Director and officer trading under 10b5-1 plans*. As Commission Chair Gensler had clearly foreshadowed, the SEC has proposed additional requirements and restrictions concerning the availability of the affirmative defense to insider trading provided by a Rule 10b5-1 plan. These include: a 120-day cooling-off period for plans adopted by individuals (which cooling off period would begin anew if a modified trading arrangement were adopted); a requirement for the adopting directors and officers to formally certify that they are not in possession of any material non-public information and that they are acting in good faith and not as part of any plan or scheme to evade applicable securities laws; and removal from the scope of the affirmative defense of multiple overlapping plans for open market trades in the same class of securities and single-trade plans (other than one such plan per 12-month period).

The release also makes clear the Commission's position that a modification of an existing plan (including cancellation) is viewed as equivalent to adopting a new plan, a view that would

be "clarified" under the new rules (and which raises the question as to whether a plan could be cancelled while in possession of material non-public information). Section 16 filings would also need to disclose whether or not reported transactions were made pursuant to a Rule 10b5-1 plan, and would add a requirement to promptly disclose bona fide gifts of securities. Plans must also be "operated" in good faith after adoption, which the release explains is meant to prohibit activity such as an insider manipulating the timing of a corporate disclosure so as to benefit their trading under an existing plan.

*Expanded policy disclosure requirements*. The proposed rules also seek to regulate (or influence) issuer conduct by requiring new disclosures of company policies. For example, issuers will have to disclose their policies and procedures (if any) with respect to trading by corporate insiders during an issuer repurchase program, and this new requirement would work hand in hand with a new requirement to disclose detailed information regarding the issuer's broader insider trading policies and procedures (including, the release suggests, granular information regarding the specific steps undertaken to determine whether to open a trading window and to document and clear individual trades). If a company does not have insider trading policies, it would have to explain why it does not.

The proposed rules also contemplate specific disclosure requirements concerning option-grant policies, with specific tabular disclosure as to grants made within 14 days of the release of material non-public information, including market prices before and after such release. The SEC previously issued accounting guidance regarding "spring-loaded" compensation awards and the impact of material non-public information on valuation.

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While modernization of the rules regarding share repurchases and trading by corporate insiders has been on the SEC's agenda for some time, the sweep and scope of the new proposals will likely inspire comment letters addressing the balance between benefit and burden and the potential chilling effect on beneficial share repurchase activity. The rules may also exacerbate already existing tensions between the shift towards compensating corporate executives increasingly with equity over cash and narrowing the opportunities to achieve any liquidity from that equity. Many of the proposals are framed as disclosure requirements but in effect would create the clear implication that certain types of trading that might otherwise be legal are to be discouraged.

Companies should plan for a fresh review of their policies, practices and procedures related to these matters and consider whether new or updated approaches are warranted. We expect that the proposals are likely to result in significant comment from market participants during the comment period, which will run for 45 days after publication of the proposals in the Federal Register (which we anticipate will occur in the coming days).

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