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DON'T PULL THE TRIGGER ON THAT STOCK TRADE JUST YET!

QUESTIONS COUNSEL SHOULD ASK INSIDERS BEFORE THEY TRADE; TOPICS TO COVER WHEN AN INSIDER LEAVES THE COMPANY

May 21, 2024

One of the routine duties of counsel for a public company is advising officers and directors on their trades in company stock and their SEC responsibilities when they leave. Because those discussions are routine, it may be tempting to fly through the analysis and move on to more "important" tasks. That would be a mistake. Skipping a step could result in a missed SEC filing or worse – liability– for one of the company's insiders. Taking a few extra minutes to cover your checklist in full could avoid embarrassment later.

QUESTIONS TO ASK BEFORE STOCK TRADES:

Are you aware of any material nonpublic information?

- Is the trading window open at the company under its insider trading policy?
- Have you completed any required pre-clearance procedures under the insider trading policy or otherwise?
- Even if there are no such procedures, have you told the General Counsel about your plans and has she okayed the sale?

Are there any special black-out periods in effect?

- Has the company imposed any special black-out periods under its insider trading policy?
- Has the company recently received or issued any notice of blackout restrictions or trading suspension under ERISA or Regulation BTR?

Do you have a Rule 10b5-1 plan in effect?

- Do both the insider trading policy and the plan permit trading outside the plan?

- Could the proposed trade be viewed as a prohibited “corresponding or hedging transaction”?
- Could the proposed trade be viewed as inconsistent with having entered into the 10b5-1 plan in “good faith”?

In light of Section 16, have you engaged in any non-exempt opposite-way transaction within the last six months?

- Have you considered stock held by others for which you may be deemed to be a “beneficial owner”.
- Are any such transactions contemplated within the next six months, including year-end or tax planning trades?
- Do you participate in any dividend reinvestment plan with your broker, employee benefit plan transactions, such as acquisitions under 401(k) type plans, or other stock sales or purchases that might not have been picked up on your Form 4 filings?

In the case of open market sales, have you confirmed that the sales will comply with Rule 144, including that:

- The company is “current” in its 10-Q and 10-K filings?
- Any required Rule 144 holding period for shares acquired in a private placement has been satisfied?
- The number of shares will not exceed the Rule 144 volume limit?
  - That the number of shares sold in any three-month period will not exceed the greater of the average weekly trading volume for the last four calendar weeks or 1% of outstanding shares?
- The “manner of sale” requirements have been met (e.g., “broker’s transaction”)?
- A Form 144 notice, if required, will be filed?

Are procedures in place to make any required SEC filings?

- In the case of open market sales, has the broker or the company agreed to make any required Form 144 filing no later than the time the sell order is placed?
- Will you or the broker notify the company or filing agent with the information needed for the timely filing of a Form 4, i.e., within two business days?

- In the case of 5% shareholders, are procedures in place to timely file any required amendment to Schedule 13G or 13D?
- Is the broker experienced in dealing with transactions by company insiders and capable of handling the transaction in an appropriate way, including filing a Form 144 notice and providing information for a Form 4 filing?

In the case of open market purchases, have you confirmed that:

- The trade will not take place during any Regulation M restricted period, i.e., a specified period prior to pricing a public stock offering?
- If you are considered an "affiliated purchaser" under Rule 10b-18, your purchase will conform to the requirements applicable to the company under that rule?

Are procedures in place to effect the transaction in a timely manner, including under the new T+1 settlement date requirement? Beginning May 28, 2024, normal stock transactions settle the next business day following the trade (i.e., T + 1).

- In the case of employee benefit transactions, does the company have its procedures in place to calculate and deposit tax withholding amounts in a timely manner?
- Does the company and/or broker have procedures in place to deliver the shares in a timely fashion, including working with the transfer agent on the removal of any restrictive legends?
- Are you prepared to incur stock borrow charges if the trade is not settled timely?

Are the shares subject to any contractual lockup restrictions?

- Has the company recently completed any stock offerings or significant M&A?
- Were the shares acquired under an employee benefit plan that imposes vesting or holding requirements?

TOPICS TO COVER WHEN AN OFFICER LEAVES HIS OR HER POSITION:

Short-swing profit rule applies up to six months after termination. Section 16(b) continues to apply to non-exempt transactions that occur within less than six months of an opposite-way, non-exempt transaction that took place while an insider was an officer or director. For example, if an officer engaged in an open market purchase of the company's common stock within the six months before his or her departure, any open market or other non-exempt sale of common stock occurring within less than six months of that purchase may result in short-swing profit liability.

If the insider does not engage in any reportable non-exempt transactions prior to departure, then he or she should not have risk of Section 16(b) liability as a result of post-retirement transactions.

Confirm that an insider has actually ceased status as an insider. The date of termination of officer status may depend on particular facts and circumstances, especially when the individual continues to perform substantive functions or receives confidential information. A memorandum or board resolution confirming the company's determination of the cessation of status could help establish the record for this purpose.

Possible post-termination Form 4. A former insider must file a Form 4 to report any non-exempt transaction in company stock after ceasing to be an officer or director that occurs within less than six months of any opposite-way, non-exempt transaction that took place while an insider. The Form 4 would need to be filed with the SEC by the end of the second business day after the date of execution of the transaction.

Note that a transaction that occurs simultaneously with departure may be deemed to occur while the insider is still an officer or director and therefore may need to be reported, whether or not exempt from Section 16(b) and whether or not within six months of a non-exempt opposite-way transaction. In those cases, counsel may need to be consulted to determine whether a Form 4 is required.

Possible post-termination Form 5. A former insider must file a Form 5 within 45 days after the close of the company's current fiscal year to report any pre-termination transactions and any reportable post-termination transactions not previously reported on Form 4. If there are no transactions requiring a Form 5, the insider should so certify to the company in writing before that date to avoid being named in the company's proxy statement for failing to file a Form 5 (unless the company "otherwise knows" one is not required). The insider should ask the corporate secretary or law department to provide an appropriate certification form.

Check exit box. On a Form 4 or 5 filed after departure, the insider should check the "exit" box in the upper lefthand corner of the form (unless he or she expects to engage in subsequent reportable transactions).

Don't forget about insider trading restrictions. Even though many of the Section 16 reporting obligations will lapse upon the insider's departure, the prohibition against insider trading will continue to apply after ceasing to be an officer or director. Federal securities laws generally prohibit buying or selling of securities while in possession, or aware, of material nonpublic information. In addition, an insider may not furnish ("tip") material nonpublic information about the company to any person who might trade on the information.

As a result, former insiders should refrain from trading until any material information they became aware of has been disclosed or ceased to be material.

Former insiders should check the company's insider trading policy as that may contain additional post-employment pre-clearance or other trading restrictions.

Potential application of Rule 144. As a former "affiliate" of the company, a former insider may sell non-restricted shares of common stock of the company without compliance with Rule 144 as soon as his or her "affiliate" status has ceased. According to the SEC staff:

> "The cessation of affiliate status is a facts-and-circumstances determination, and counsel should not assume that it ceases instantly when, for example, the former affiliate resigns from his or her position at the company."

Accordingly, depending on the facts and circumstances, it may be prudent to comply with Rule 144 in connection with any open market sales during the three-month period following the termination of affiliate status.

RELATED CAPABILITIES

- Securities & Corporate Governance

MEET THE TEAM

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