

**The Annual Alan Dye Conference**  
**On Section 16**

**The Latest Developments**

**Questions**

**January 29, 2025**

Alan Dye

On

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Wednesday, January 29, 2025

## QUESTIONS

### **Post-Termination Transaction**

**Question:** One of our Section 16 officers was granted a performance share award last year, vesting in two equal installments if the performance criteria are satisfied. We did not report the grant, because the performance criteria related to operational hurdles unrelated to the price of the company's stock. The first half of the award will vest on March 15, which is the first anniversary of the date of grant, but will not pay out until the compensation committee certifies the achievement of the performance criteria at its meeting on April 15. Before then, on March 31, the Section 16 officer will retire from the company. Will the payout of the award on April 15 be reportable on Form 4, given that the performance period ended before the officer's retirement date, or will this be considered a post-termination transaction exempt from reporting?

### **Restricted Stock Units — Column 9 Reporting**

**Question:** I recently joined a company that reports its annual grants of restricted stock units in Table II of Form 4. A tranche of RSUs is about to vest, and the internal team is proposing to report the vesting as a disposition of RSUs in Table II and the acquisition of an equal number of shares of common stock in Table I, which I understand. The team also proposes to include in Column 9 of Table II, on the line reporting the disposition, all of the insider's unvested RSUs, not just those underlying the award that has a tranche vesting. I have not seen this before — can you advise whether this manner of reporting is correct?

### **RSU Vesting and Section 16(b)**

**Question:** The company's awards of RSUs and PSUs provide that, upon vesting, shares will be sold automatically in a sell-to-cover transaction to satisfy the company's tax withholding obligation. The grantee may not elect a different method for paying the tax. If a Section 16 person

purchases stock within six months of a sell-to-cover transaction, could the purchase be matched with the sale under the short-swing profit rules?

### **Rule 10b5-1 Checkbox**

**Question:** We recently filed a Form 4 to report an insider's sale of stock pursuant to a Rule 10b5-1 plan adopted under the amended version of the rule. We forgot to check the 10b5-1 checkbox on the Form 4, but we did include a footnote indicating that the sales reported on the Form 4 were effected pursuant to a Rule 10b5-1 trading plan. Do we need to file an amendment to check the box?

### **Insiders as Co-Trustees of Trust**

**Question:** Insider A and Insider B are co-trustees of a trust established by Insider A's sister. Insider A and his sister are beneficiaries of the trust, and neither Insider B nor any member of his family is a beneficiary. The trust plans to sell common stock. Insider A will need to report the sale on Form 4, but Insider B will not, correct? Additionally, because the number of shares to be sold exceeds 5,000, Insider A will also need to file a Form 144, I believe.

### **Change in Form of Beneficial Ownership — Transfer to Trust**

**Question:** An insider is gifting company stock by transferring directly owned shares to an irrevocable trust of which the insider is trustee and a beneficiary. The insider reports the shares already owned by the trust as an indirect holding. I assume that the upcoming gift is a change in form of beneficial ownership. If the gift is made in a series of transfers, would it make sense to report each transfer anyway instead of adding the transferred shares on the insider's next Form 4, with a "catch-up" footnote?

### **UGMA — Grandparent as Custodian**

**Question:** A Section 16 officer's parent, who does not reside with the insider, opened an UGMA custodial account for the officer's children (who do reside with the insider) and purchased issuer stock in the account. The grandparent serves as custodian of the account and has sole voting and investment power. I'm guessing the officer has a reportable pecuniary interest in shares

purchased for the account, despite the fact that the grandparent is the custodian, but any insight would be appreciated.

### **Deadline for Reporting Vesting of Performance Share Awards**

**Question:** Can you please address performance share awards, in particular when the Form 4 is due? My understanding is that the deadline is based on when the performance criteria have been met. However, let's say the criteria are met based on the company's performance for the year ending December 31, but the satisfaction of those criteria is not "verified" until our accounting department completes its year-end closing activities, which might not be until late January or early February.

### **Reporting Disposition of Shares when Retaining Voting Power**

**Question:** A Section 16 officer serves as trustee of a trust for the benefit of his children. The trust holds issuer securities, and the insider reports the trust's holdings on his Section 16 reports, along with a disclaimer of beneficial ownership. The insider has agreed to terminate the trust and distribute the shares to his children, but only on condition that the children grant him an irrevocable proxy to allow him to continue to vote the shares for as long as they own the shares. When should the officer report his disposition of the shares—upon dissolution of the trust, or when the children sell the shares? Technically, the insider could still report the shares after the dissolution of the trust, and disclaim beneficial ownership as he has done historically.

### **RSU Vesting with Delayed Settlement**

**Question:** An insider holds restricted stock units subject to a sell-to-cover ("STC") withholding provision. Usually, the STC and settlement occur on the first business day following the vesting date. However, the underlying award agreement calls for settlement "as soon as administratively practicable" and also provides that the settlement period may be extended so long as all settlements occur within 60 days after vesting. For administrative reasons, we are considering an extended settlement period with settlements staggered over a 60-day period. The RSUs were reported in Table II at the time of grant. We are trying to determine the correct way to report the vesting and STC transactions on Form(s) 4. Our original thought was that we should report the vesting on Form 4 as the conversion of the RSUs and the acquisition of common stock, using transaction code "M." We would then file follow-up Forms 4 to report STC transactions as they

occur. However, we have researched precedent and are not seeing good examples of this kind of transaction in practice, and your Model Form 144 seems ambiguous. Do you agree with our proposed way of reporting the transactions?

### **Deferral of Vesting Restricted Stock Units**

**Question:** Is a Form 4 required when an insider defers receipt of shares issuable upon the vesting of restricted stock units that were reported in Table I at the time of grant and the terms of the deferred compensation plan provide that the deferred units will settle in stock, and can't be settled for cash? Please assume that no shares or units will be withheld on the vesting date to pay FICA or other taxes.

### **Availability of Rule 16a-13 for Transfer to Spouse**

**Question:** One of our insiders holds company stock directly in her own name and reports indirect ownership of stock held by her spouse. If the insider transfers some of her directly owned shares to her spouse, thereby decreasing her directly owned shares and increasing her indirectly owned shares, is Rule 16a-13 available to exempt the transfer from reporting on Form 4 because the "net" pecuniary interest being reported will not change?

### **Early Form 144 for Sell to Cover**

**Question:** If a company has an automatic sell to cover provision in its RSU award agreements, calling for an open market sale of stock to pay withholding taxes upon vesting, and it is clear that the number of shares to be sold on an upcoming vesting date will be below Rule 144's volume limit, is there any reason not to file a Form 144 a week before the vesting date, or even earlier, using an estimate of the number of shares to be sold? And would it be ok to use the fair market value the day prior to the Form 144 filing date?

**Alan:** I don't see any reason at all not to file early, as long as the filing is made within the 90 days prior to the vesting date. The filing just needs to show a good faith estimate of the number of shares the insider expects to sell, and the Form 144 is good for 90 days. And instruction 3(d) to Form 144 says the value of the shares covered by the form can be based on the fair market value on any day within 10 days prior to the filing date, so using the day before the filing date would comply with the form's requirements.

### **Weekend Vesting--Monday Valuation Date**

**Question:** We have a situation in which a prior RSU award will vest on a Saturday. The terms of the award provide that the number of shares to be withheld to pay taxes is to be determined based on the market price of the stock on the following business day, which in this case will be Monday. Can you confirm that we should use Monday's date as the date of tax withholding, making the Form 4 due on Wednesday?