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On

The Latest Section 16 Developments

Wednesday, January 24, 2024

QUESTIONS

Receipt of Gift of Indirectly Owned Shares

We have an executive officer whose three minor children were gifted shares by their grandparents in 2021, and the gifts were reported on Form 4 as the acquisition of indirect ownership of shares by gift, using transaction code “G” and a “V” for voluntary reporting. We have just learned that the children recently received another gift of shares. We are tracking down the date of the gifts, but if the gifts occurred after the effective date of the 2023 rule change relating to gifts, how do you suggest we handle the reporting?

Reporting Rule 10b5-1 Plan Sale and Non-Plan Sale on Same Form 4

A Section 16 officer consummates two transactions over two days. First, the officer sells common stock on the open market. Then, the next day, the officer sells common stock on the open market upon the vesting of restricted stock units, pursuant to a “sell to cover” Rule 10b5-1 plan adopted under the new 10b5-1 rules. The officer would like to file a single Form 4 to report both sales. If the Form 4 reported only the sell-to-cover transaction, the new Rule 10b5-1 box would have to be checked. Can both transactions be reported on a single Form 4, and if so, would it be appropriate to check the 10b5-1 box?

Year-End Form 5 Compliance

If during our annual year-end Section 16 compliance check we discover that a reporting person had an open market sale which should have been reported but wasn't, I assume we could report the sale on Form 5. Am I correct that we would report the sale the same way we would have reported the sale if it had been timely reported on Form 4 (for example, using a weighted

average price and disclosing the range of prices in a footnote)? Do you recommend that we drop an additional footnote to explain that the Form 5 is reporting a sale that should have been reported earlier on Form 4, or will that be self-evident?

Chief Operating Officer as Non-Section 16 Insider

If a company's board determines that the designated chief operating officer is not an executive officer because he is not in charge of a principal business unit, division or function and does not perform a significant policy-making function, is it ok not to consider the person a Section 16 officer?

Filing Form 4 Using Issuer's EDGAR Codes

The board appointed a new director on short notice, and we are concerned that the SEC will not process the Form ID in time to allow us to file a Form 4 to report the director's receipt of an award of restricted stock units on the effective date of his appointment. If we don't receive the director's EDGAR codes on time, could we file the Form 4 using the issuer's EDGAR codes, and avoid having to disclose a filing delinquency under Item 405?

Reporting Performance Share Awards

I would appreciate a review of the proper reporting of performance shares granted to Section 16 officers. In our case, the award will vest at the end of three years, and the number of shares earned will be determined by the achievement of performance criteria relative to the performance of a peer group of companies. During the three-year period, dividends will accrue on the target number of performance shares and will be reinvested in additional performance shares.

Performance Shares Partially Earned

We are hoping you can provide guidance for reporting our performance-based awards. The company granted PSUs that will vest and settle in three years based on the achievement of several financial goals. The performance will be measured each year and also at the end of the three-year period using the applicable weighting for each year in the performance cycle. As such, although the aggregate number of shares to be issued will not be determined until the end of year three, we will know at the end of each of the first two years the minimum number of shares earned for that year based on the annual performance criteria. The question is: are we required to report the “earned” shares each year, or can we report everything upon completion of the full three-year performance period?

Form 3 Reporting of Shares Held in Revocable Trust

We have a new director who holds shares of company stock in a revocable living trust. On her Form 3, should we report the shares as owned directly or indirectly?

Including Current Transaction in Form 4/A Correcting Previously Reported Transaction

We recently discovered that a reporting person’s 2022 option grant was understated when reported on Form 4. The same reporting person plans to execute an open market sale this week, unrelated to the under-reported option, and we will need to report that sale on Form 4. Can we report the sale in a Form 4/A filed to correct the error in the Form 4 filed to report the option grant? If the answer is yes, would we do that by updating the holding in Table I and reporting the sale in Table I?

Form 4 Exit Box

A Section 16 officer engages in a reportable transaction one day before they lose their Section 16 status. Because the transaction took place while the individual was subject to the Section 16 requirements, I believe a Form 4 has to be filed to report the transaction, even though

the due date for the Form 4 is after the person is no longer subject to Section 16. Do you agree, and if so do I need to check the exit box on the form?

Form 144 Filings

Does a Form 144 have to be filed any time a Section 16 insider sells stock in the open market and reports the sale on a Form 4, assuming the sale exceeds 5,000 shares or \$50,000 in proceeds? Since the SEC started requiring Forms 144 to be filed electronically, our Section 16 officers' brokers have been filing the Form 144 promptly, and the Form 144 appears on the insider's EDGAR page a day before we file the Form 4 to report the same sale. In looking at other companies' public filings, I see a lot of Forms 4 reporting sales that exceed the Form 144 filing thresholds, but I don't see a corresponding Form 144. I don't think they are overlooking the Form 144 filing requirement. What am I missing?

Dividend Equivalent Units and Column 5

Our company grants restricted stock units to officers, and the awards accrue dividend equivalent units as dividends are paid on the common stock. The company has a dividend reinvestment plan that complies with Rule 16a-11, so dividend accruals are not reported on Form 4 or Form 5, but they are added to Column 5 of Table I each time we file a Form 4 to report a transaction in common stock. If we need to file a Form 4 for an insider after the record date for a dividend but before the payment date, we won't know the number of DEUs the insider will receive, because the number depends on the closing price of the company's stock on the dividend payment date. Do we need to disclose anything in the Form 4, like an estimate of the number of DEUs the officer will receive?

Sales Before Appointment as Section 16 Person

A candidate to serve on the board is expected to be appointed as a director on January 31. On January 28, the candidate instructs his broker to sell of his shares of company stock. When we file the candidate's Form 3 after he is appointed to the board, will the Form 3 report that he doesn't beneficially own any shares?

Spouse as Beneficiary of Family Trust

We are preparing a Form 3 for a new director whose wife is the beneficiary of a trust that holds company stock. The insider himself has no pecuniary interest in the trust, and the trust has an independent trustee. Do the shares of company stock held by the trust have to be reported in the director's Form 3?