

SEC Proposes Amendments to Rule 10b5-1 Plans and Increased Disclosure About Insider Trading Policies

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Major changes may be on the horizon for "Rule 10b5-1" plans, which allow (1) company insiders to sell their company's stock (often an important piece of an employee's compensation package) or (2) an issuer to repurchase its shares, each at times when it otherwise might be prevented from doing so under the insider trading laws designed to prohibit trading by those who possess material non-public information (as is often the case for a company's officers, directors and management) or because of issuer-imposed blackout periods.

There have been calls for reforming Rule 10b5-1 for several years:

- former Securities and Exchange Commission (SEC) Chair Jay Clayton had previously proposed requiring cooling-off periods following adoption, amendment or termination of a plan;
- in late spring of 2021, bipartisan legislation was re-introduced in the US Senate to direct the SEC to study whether Rule 10b5-1 should be amended;
- more recently, SEC Chair Gary Gensler stated that Rule 10b5-1 plans "have led to real cracks in our insider trading regime" and directed SEC staff to consider and recommend restrictions on the use of such plans; and
- on August 26, the Investor as Owner Subcommittee of the SEC's Investor Advisory Committee (IAC), released draft recommendations regarding amendments to rules governing Rule 10b5-1 trading plans, which the IAC formally approved at its meeting held on September 9.

Therefore, unsurprisingly, on December 15, the SEC proposed amendments regarding the rules governing Rule 10b5-1 trading plans that are mostly in line with the IAC's approved recommendations and include the following proposed changes:

Increased Restrictions on Trading Windows

The first set of recommendations aims to limit methods by which critics have suggested market participants have tried to evade Rule 10b5-1's restrictions by:

1. requiring a "cooling off" period of at least 120 days for directors and officers subject to reporting requirements under Section 16 of the Securities Exchange Act of 1934 (Section 16 Directors and Officers), and at least 30 days for issuers, between the adoption or modification of a 10b5-1 plan and the execution of the first trade under that plan;
2. limiting "overlapping" plans, where a single person has more than one Rule 10b5-1 plan in effect at any given time, to one active plan per person within a 12-month period; and
3. limiting single-trade plans, where only a single trade is made for the duration of a 10b5-1 plan, to one single-trade plan within a 12-month period.

Notably, the SEC also stated that a modification of a Rule 10b5-1(c) trading plan, including cancelling a trade, is equivalent to terminating the prior trading arrangement and adopting a new Rule 10b5-1 trading plan.

The SEC noted that academic studies conducted concerning the potential abuse of Rule 10b5-1 plans found that opportunistic trading behavior most commonly occurred in plans (1) having short cooling-off periods, (2) executing only a single trade; and (3) which were adopted and began trading prior to that same quarter's earnings announcement. The SEC indicated the above proposals would address these issues regarding Section 16 Directors and Officers by extending the length of time between the adoption of a 10b5-1 plan and the commencement of trading, thereby ensuring such insiders cannot adopt a plan that executes a trade in the same quarter. Additionally, limiting the availability of the affirmative defense under Rule 10b5-1(c)(1) for overlapping plans and single-trade plans to one active plan per person within a 12-month period and one single-trade plan during any consecutive 12-month period would prevent gamesmanship and signal to the market a plan was entered in good faith.

Furthermore, current rules allow any person with material non-public information about a company or its securities to trade in such company's securities under an effective Rule 10b5-1 trading plan, provided, among other considerations, that such plan was adopted in good faith (and not as part of a scheme to evade Rule 10b5-1 prohibitions) and at a time when such person was not aware of any material nonpublic information. An additional proposed amendment would require that Section 16 Directors and Officers now furnish to the issuer a written certification, at the time of the 10b5-1 plan's adoption, that such insider is not aware of any material nonpublic information regarding the issuer and is adopting such 10b5-1 plan in good faith.

Enhanced Public Disclosure of Rule 10b5-1 Plans and Insider Trading Policies

The remaining SEC amendments propose to require public disclosure of Rule 10b5-1 plans and insider trading policies by:

4. requiring issuers to disclose in their quarterly reports the adoption or termination of 10b5-1 plans by the issuer itself and any of its directors and officers, as well as the material terms of such 10b5-1 plans;
5. requiring issuers to disclose in their annual reports their insider trading policies and procedures, or explain why the issuer has not adopted any such policies and procedures; and
6. modifying Form 4s to include the following additional fields: (a) a checkbox to indicate whether a specific trade was made pursuant to a 10b5-1 plan, and (b) a field to indicate the date of adoption or modification of the associated 10b5-1 plan.

The SEC also is proposing new rules regarding reporting of gifts of stock by Section 16 Directors and Officers as well as new executive compensation disclosure relating to certain awards to directors and certain executive officers that are made within specified time periods. These proposals include:

7. requiring all "bona fide" gifts of stock by Section 16 Directors and Officers to be reported on Form 4 before the end of the second business day following the date of such gift; and
8. requiring issuers to include in their executive compensation disclosure any option grant policies and practices and to provide tabular disclosure showing option grants made within 14 days of the release of certain material nonpublic information, and the market price of the underlying securities on the trading day before and after the release of such information.

The SEC will seek public comment on the proposed amendments for 45 days following the publication of the comment request in the *Federal Register*. The complete release of the proposed amendments is available [here](#).

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