

## SEC Chairman Announces Plans for Further Regulation of Rule 10b5-1 Plans

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On June 7, Securities and Exchange Commission (SEC) Chairman Gary Gensler announced plans to revise rules governing Rule 10b5-1 plans. Rule 10b5-1 plans provide executive insiders with a defense against insider trading claims that may otherwise attach from having material nonpublic information (MNPI) at the time of a trade by allowing insiders to adopt plans for buying or selling securities at a predetermined price, amount and date. Gensler's remarks stem from long-standing controversy surrounding Rule 10b5-1 plans, as some investors claim that plans are easily manipulated and abused due to a lack of regulation.

### Rule 10b5-1 Background

The Exchange Act of 1934 § 10(b) and Rule 10b-5 prohibit manipulative and deceptive devices in the trading of securities, including insider trading. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. To address concerns with company executives and directors buying and selling shares based on MNPI, the SEC promulgated Rule 10b5-1 in 2000 to provide an affirmative defense to allegations of insider trading. If the executive possessing MNPI submits a binding written 10b5-1 plan to buy or sell securities ahead of time, then the transaction is presumed not to be made on the basis of MNPI. 17 C.F.R. § 240.10b5-1.

Rule 10b5-1 plans are thus a critical tool in avoiding insider trading or the appearance of insider trading and have long served as an important financial planning mechanism for executives. These individuals often possess or have access to MNPI, yet also hold stock in the company and may want to buy or sell shares. Similarly, companies desire a reliable compliance mechanism to oversee trades made by insiders and minimize the legal risks associated with insider trading. Adoption of Rule 10b5-1 plans have increased over time, with insiders at 57 percent of S&P 500 companies using such plans in 2020. Bank of America, [Work Place Insights: Navigating company stock regulations with Rule 10b5-1 trading plans](#) (2021).

Controversy surrounding Rule 10b5-1 plans stems from the Rule providing only a few requirements to establish an affirmative defense to insider trading. Written plans must include the date, amount and price of securities to be bought or sold. Alternatively, the written plan can specify a formula or algorithm to determine the amount, price and date of the sale or purchase. Beyond these requirements, critics express concern that insiders can easily exploit plans to evade SEC scrutiny. For example, once a plan is in place, trades may occur immediately as there is no requirement for a cooling-off period. Insiders who do not have MNPI also may modify plans at any time, and insiders with MNPI may cancel plans at any time. Additionally, plans are not required to be reported to the public, and insiders may adopt as many plans as they desire.

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## Gensler's Remarks

In his June 7 remarks, Gensler pointed to Rule 10b5-1 plans as the source of “real cracks in our insider trading regime.” Gensler has called on SEC staff to make recommendations for the SEC’s consideration that address four main weaknesses of Rule 10b5-1 that he has identified.

**Cooling-Off Period.** Gensler asked SEC staff to consider recommendations regarding the lack of a cooling-off period required before insiders make their initial trade. Gensler is concerned that the absence of a cooling-off period may be viewed as a “loophole to participate in insider trading.” An approach that Gensler says deserves further consideration is a 4-6 month cooling-off period, which also has been advocated for by former SEC Chairman Jay Clayton and current SEC Commissioners Allison Herren Lee and Caroline Crenshaw.

**Limitations on Termination.** Gensler takes issue with Rule 10b5-1’s lack of limitations of insider’s ability to terminate a plan. Currently, an insider who has MNPI may cancel a plan at any time. According to Gensler, such a cancellation “may be as economically significant as carrying out an actual transaction.” MNPI may influence an insider’s decision to cancel a plan, which may undermine investor confidence. For these reasons, Gensler has asked SEC staff to consider regulations on when and how plans can be terminated.

**Mandatory Disclosure Requirements.** Rule 10b5-1 in its present form does not contain any mandatory disclosure requirements for plans. Gensler believes that mandatory disclosure requirements regarding the adoption, modification and terms of the plans may enhance investor confidence in the market.

**Number of Plans.** Gensler views the lack of limits on the number of 10b5-1 plans that insiders can adopt as another weakness of Rule 10b5-1 plans. Where insiders may enter into multiple plans and cancel one or more of those plans at any time, insiders may mistakenly think that they are permitted to pick the most favorable plan as they please. Gensler asked SEC staff to evaluate restrictions on the number of plans.

Whether Gensler’s remarks will lead to changes to the Rule and what the scope of those revisions, if made, may be is yet to be seen. Gensler’s remarks are available through the [Wall Street Journal](#).

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