

In-House Corner: Rule 10b5-1 Plans

This feature of our blog is where our in-house readers share tips, anecdotes and thoughts about things that come up in their daily practice. This particular batch of thoughts is about handling Rule 10b5-1 plans [feel free to ping me and share your thoughts – they will be posted anonymously or with attribution, whichever you desire]: 1. "If you are in the unfortunate circumstance where an executive or director is terminally ill or having high-risk surgery, you should note that most 10b5-1 plans automatically terminate at death. This becomes particularly tricky if the plan covers stock options with an impending expiration date. In our case, the broker permitted the individual to assign all obligations under an existing 10b5-1 plan to her family trust. Under the terms of the Assignment and Assumption Agreement (signed by the individual, the Trustee and the broker), sales under the plan could continue after death so long as the Trust remained in existence." – Chaka Khan Doe

2. "At the risk of sounding a bit pedantic - or perhaps like I'm telling the SEC to get off my lawn - I'll weigh in on the reworking of Rule 10b5-1 that appears to be coming our way. Most of the parade of horrors described by SEC Chair Gensler as abuses of the Rule appear - to me at least - to be less about deficiencies within the Rule than about the fact that the insider didn't have a valid plan in the first instance. Since a lack of MNPI is a prerequisite for having a valid plan, what exactly would be the point of mandating a cooling-off period? The insider either has no MNPI (in which case, a cooling-off period is superfluous) or has MNPI (in which case, they don't have a valid plan). Perhaps if the SEC spent a bit more time actually pursuing 10b-5 violations, we wouldn't need to hamstring the rest of the market with mandatory cooling-off periods or similar structures." – Roger Moore Doe

3. "I have always worked with the Company's brokers to make sure that the form of 10b5-1 plan comports with the Company's insider trading policy. At my current company, we strongly encourage our senior execs directors to enter into 10b5-1 plans if they want to trade. We review all of these plans against a pretty strict policy. We do our best to limit the number of brokers involved. In a past life, we had one employee who entered into a very complicated plan. Not only did the sales wind up firing close to earnings, he also put himself at risk of not meeting executive holding requirements. My take-away: too complicated a plan is bad. (The algorithms that the executive picks to figure out what to see is up to then.) But on the execution end, with Forms 4 and continued scrutiny, KISS. Also, try to avoid sales that are scheduled to occur prior to the earnings calls. Even though they are 10b5-1 sales (and we require those to be disclosed on every relevant Form 4), not everyone reads the footnotes." – Mary Tyler Moore Doe

4. "Before I sign a 10b5-1 Plan, I send this message to the insider: 'Can you please confirm that you are not in possession of material, non-public information? The materiality of information depends upon the circumstances. Information is considered "material" if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision, or if the facts would have been viewed by the reasonable investor as having significantly altered the "total mix" of information publicly available. Material information can be positive or negative and can relate to virtually any aspect of a company's business and impact the value of any type of security – debt or equity.' This is pursuant to our Company Insider Trading Policy. Under the Insider Trading Policy, as amended, once you have a 10b5-1 plan in place, I cannot approve (i) modifications to or cancellations of the plan, (ii) trades outside of the plan or (iii) any additional plans (only one plan operating at a time). Please make sure the plan captures your trading needs for its duration." – Marlo Thomas Doe

5. "Regarding 10b5-1 plans, I recommend that a company's securities/insider trading policy require pre-approval

of all 10b5-1 plans adopted by anyone subject to the policy." – Eric Grimshaw

6. "Ugh. I can't stomach these." – Pauly D. Doe

7. "Our Insider Trading Policy includes an addendum specifically devoted to 10b5-1 Plans (rules, requirements, cooling off period, review process, etc.) The Trading Plan document must be reviewed and counter-signed by the legal team. For Section 16 officers – despite the obvious purpose of entering into a plan – a plan may not permit trading within 10 days before earnings. We don't like the optics of filing Form 4s around earnings. Insiders must have a pre-clearance interview with the legal team prior to entering into a plan. Following that pre-clearance interview, a confirmation email is sent to the individual and the broker." – Rick Hansen

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