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SEC Enforcement Action Brings Rule 10b5-1 Plans Into Spotlight

Last December, the **SEC proposed rules** that would alter how some Rule 10b5-1 plans work, including requiring a 120-day cooling-off period for officers and directors, and a ban on overlapping plans. Much ink has been spilled on that rule proposal—see **our blog** and the **comments sent in** on that proposal.

Even though the SEC's Reg Flex Agenda predicts that final rules are not expected until next April, that doesn't necessarily mean that Rule 10b5-1 plans aren't top-of-mind. And a recent SEC enforcement action is adding to many practitioners' heightened focus as it may signal how that final rule will look and also serves as a warning to companies that they should take care about how they handle their Rule 10b5-1 plans now.

In this enforcement action, the company derived a significant amount of its revenue from an advertising partner, which alerted the company of planned advertising algorithm changes that would result in less revenue to the company. According to the **SEC's enforcement order**, the company failed to disclose this known trend on an earnings call and in its annual report on Form 20-F in March and April 2016 as revenues were declining (3% decline in Q4 2015 and 8% decline in Q1 2016), finally announcing that it was lowering 2016 guidance in May 2016.

While the company's CEO and President were in possession of this material non-public information in March 2016, they used a jointly-held entity to enter into a Rule 10b5-1 plan to sell some of the company's securities. The entity sold shares under the plan prior to the May announcement, avoiding approximately $300,000 in losses.

In addition to civil penalties, the SEC's order requires the company's CEO and President to abide by the 120-day cooling-off period and the overlapping plan ban that is part of the SEC's proposed rule. It's a warning shot worth noting.

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