

5 Things You Should Consider for 10b5-1 Plans Right Now

With all signals pointing to the SEC acting on Rule 10b5-1 plans under SEC Chair Gensler– most likely through the rulemaking process –it's a good time to assess what (if any) changes you should consider for your 10b5-1 plans and policies ahead of any new disclosure obligations. Over the last few months, we've gotten a clearer picture of the direction the SEC might go based on statements by members of the SEC Commission and Staff (like [this speech](#) by Chair Gensler). In [this blog](#) that we published right after Chair Gensler's speech, we noted four likely proposed rule changes for Rule 10b5-1 plans: required cooling-off periods, limits on cancelling plans when in possession of material non-public information, limiting insiders to one plan at a time, and disclosure requirements for adoption, amendment and the terms of such plans. Given the probability of SEC rulemaking in this area, here are five things to know about Rule 10b5-1 plans and related company policies: 1. Most companies haven't changed their existing practices, including using company 10b5-1 plans for stock buybacks and maintaining existing "cooling off" periods (or lack of such a period). But companies may be reviewing and sharpening some of their existing practices, including beefing up their internal controls to ensure that new company plans aren't being adopted when a small subset of management may have confidential information about a potential deal. Evidencing its focus in this area, the SEC brought an enforcement action on precisely this issue in October 2020.

2. Adoption of new plans, termination of existing plans and material modifications to plans should be viewed through the prism that optics matter and such actions will be judged with the benefit of hindsight about how things worked out in the end.

3. Be particularly careful with the cancellation of a 10b5-1 plan. The optics can look quite bad if the company's stock price was to fall after the termination. The SEC has raised concern with plans that are cancelled while an individual has material nonpublic information, a practice not prohibited under current 10b5-1 rules.

4. Be aware that the considerations often are different for companies conducting a buyback through a 10b5-1 plan than they are for insiders using such plans. Although the law technically is the same, the considerations can be different – particularly the analysis of whether "material non-public information" exists.

5. Some companies are changing their blanket policy that all insiders be required to trade only through 10b5-1 plans. For those few companies with this practice, they are eliminating it due to the frequent need for terminations or modifications when all trades are being conducted by insiders through such plans – which in turn can cause bad optics. If you modify or cancel plans often, that could bolster challenges of good faith or infer scienter.

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