

DOJ Secures Conviction in First Insider Trading Case Based Exclusively on Rule 10b5-1 Trading Plans

On June 21, 2024, a Los Angeles federal jury convicted former Ontrak, Inc. CEO and Chairman of the Board of Directors Terren S. Peizer of insider trading in a first-of-its-kind prosecution based exclusively on the use of Rule 10b5-1 plans. The U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”) charged Peizer in March 2023, alleging that he avoided losses of more than \$12.5 million by trading pursuant to two Rule 10b5-1 plans established while he was in possession of material non-public information (“MNPI”). DOJ and SEC brought these charges the same week that SEC’s updated amendments to Rule 10b5-1 became effective, imposing mandatory cooling-off periods among other new disclosures and trading restrictions.^[1] Following the verdict, Principal Deputy Assistant Attorney General and Head of DOJ’s Criminal Division, Nicole M. Argentieri, cautioned that this was DOJ’s “first insider trading prosecution based exclusively on the use of a trading plan, but it will not be our last.”^[2] These developments signal that public companies and corporate insiders should anticipate heightened scrutiny around trades pursuant to Rule 10b5-1 plans and aggressive enforcement of suspected abuses by corporate insiders.

Related Capabilities

- Government Enforcement & Corporate Investigations
- Corporate Governance & Compliance
- Investment Management
- Investment Funds
- Financial Services Regulatory

Key Takeaways

- Rule 10b5-1 plans alone cannot shield corporate insiders from insider trading liability. Such pre-set trading plans can only provide an affirmative defense to insider trading allegations when entered into in good faith and without the benefit of MNPI.
- DOJ and SEC brought charges against Peizer as part of a “data-driven initiative” to identify abuses of Rule 10b5-1 plans.^[3] Public companies and corporate insiders can expect that, going forward, the government will employ sophisticated data analytics tools, information disclosed pursuant to amended Rule 10b5-1, and SEC sweep-style inquiries to identify and prosecute suspicious trading by corporate insiders pursuant to Rule 10b5-1 plans.
- Public companies and corporate insiders should review their insider trading policies and Rule 10b5-1 plans to ensure compliance with SEC’s recent amendments to Rule 10b5-1, the SEC’s evolving views of the scope of insider trading prohibitions, and best practices.

The Insider Trading Charges Against Peizer

According to DOJ and SEC, in May and August 2021, Peizer adopted two Rule 10b5-1 plans while in possession of MNPI regarding the risk that Ontrak's then-largest customer would terminate its contract with Ontrak.^[4] In May 2021, Peizer allegedly entered into the first Rule 10b5-1 plan after learning that the customer had expressed serious concerns about maintaining its contract with Ontrak. Eight days later, the customer informed Ontrak of its intent to terminate the contract by year-end. In August 2021, Peizer allegedly entered into the second Rule 10b5-1 plan approximately one hour after Ontrak's lead negotiator for the contract confirmed to Peizer that the contract likely would be terminated. Ontrak publicly announced that the customer had terminated its contract six days later, and Ontrak's stock price dropped by approximately 44%. DOJ and SEC alleged that Peizer sold approximately \$20 million in Ontrak shares and avoided more than \$12.5 million in losses by entering into and trading pursuant to the Rule 10b5-1 plans while in possession of MNPI.

At trial, prosecutors focused on evidence that Peizer disregarded warnings by two brokerage firms to observe a cooling-off period after establishing his Rule 10b5-1 plans.^[5] Instead, Peizer allegedly began trading the day after entering into the May 2021 trading plan and three days after entering into the August 2021 trading plan. Prosecutors also focused on Peizer's allegedly false statements in Rule 10b5-1 plan certifications.

Defense counsel emphasized that Peizer had relied on the advice of his management team that there was no MNPI at the time he entered into his trading plans.^[6] The defense further argued that Peizer had expressed his intention to sell expiring Ontrak stock warrants long before Ontrak's customer communicated concerns about its contract and that cooling-off periods were not legally required at the time Peizer entered into his Rule 10b5-1 plans.

After deliberating for approximately six hours over two days, the jury found Peizer guilty of one count of engaging in a securities fraud scheme and two counts of securities fraud for insider trading.^[7]

Conclusion

In light of heightened scrutiny around trading by corporate insiders under Rule 10b5-1 plans, public companies and corporate insiders should take action to evaluate their insider trading policies and Rule 10b5-1 plans to ensure compliance with SEC rules, the SEC's evolving views of the scope of insider trading prohibitions, and best practices—including controls reasonably designed to prevent the adoption, modification, or cancellation of Rule 10b5-1 plans by corporate insiders while in possession of MNPI.

^[1] See U.S. Sec. & Exch. Comm'n ("SEC"), Release No. 2022-222, "[SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures](#)"

(Dec. 14, 2022).

[2] U.S. Dep't of Justice ("DOJ"), Release No. 24-797, "Chairman of Publicly Traded Health Care Company Convicted of Insider Trading" (June 21, 2024).

[3] *Id.*

[4] Indictment, *United States v. Peizer*, No. 2:23-cr-00089 (C.D. Cal. Feb. 24, 2023); Compl., Sec. & Exch. Comm'n v. Peizer et al., No. 2:23-cv-01511 (C.D. Cal. Mar. 1, 2023).

[5] Law360, "Ontrak Founder Convicted in Novel Insider Trading Case" (June 21, 2024).

[6] *Id.*

[7] *Id.*