

SEC Proposes New Amendments to Rule 10b5-1 Trading Plans and Disclosures

by Kimberley R. Anderson

On December 15, 2021, the SEC proposed amendments to Rule 10b5-1, a rule that provides a safe-harbor from liability from the “insider trading” prohibitions under Section 10(b) of the Securities Exchange Act and Rule 10b-5.¹

Under Rule 10b5-1, a securityholder (generally, officers, directors, and other affiliates) and the issuer may enter into a contract, instructions, or written plan at a time when the securityholder is not aware of material nonpublic information. Such contract, instructions, or written plan may specify the securities and the basis on which the securities may be bought or sold, but may not permit the securityholder to exercise any influence on how, when, or whether to effect the purchases or sales. So long as a trading plan is adopted in good faith and otherwise meets the requirements of Rule 10b5-1, the person implementing the plan gains an affirmative defense against liability for insider trading, even if the trades are later effected at a time when the insider is in possession of material nonpublic information.

Earlier this year, SEC Chair, Gary Gensler, expressed concern about potential abuses of the current Rule 10b5-1, citing several perceived problems with the current rule, including the absence of limitations on when sales can commence once a plan is adopted, whether a plan can be canceled once adopted, and the number of plans one person can put in place simultaneously.²

In response to Chair Gensler’s request for recommendations, the SEC proposed new conditions on the availability of the Rule 10b-5(c)(1) as an affirmative defense to insider trading liability and enhanced disclosure regarding Rule 10b5-1 trading arrangements, option grants, and issuer insider trading policies and procedures. The proposed changes include:

- A new mandatory 120-day cooling-off period for corporate officers and directors before any trading can commence under a 10b5-1 trading arrangement after its adoption or modification;
- A new mandatory 30-day cooling-off period for issuers before any trading can

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- commence under a 10b5-1 trading arrangement after its adoption or modification;
- Requiring officers and directors to certify to the issuer that they are not aware of material nonpublic information about the issuer or the security when adopting a new or modified trading arrangement;
 - Eliminating the 10b5-1 affirmative defense for multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities;
 - Limiting the availability of the 10b5-1 defense for single trade plans to one plan in any consecutive 12-month period;
 - A requirement that issuers who file annual reports on Form 10-K or 20-F disclose whether (or if not, why not) the issuer has adopted insider trading policies and procedures and the terms of such policies and procedures;
 - A requirement for an issuer to disclose in its annual reports its option grant policies and practices, and to provide tabular disclosure showing grants made within 14 days of the release of material nonpublic information and the market price of the underlying securities on the trading day before and after the release of such information;
 - A requirement for issuers that file quarterly reports on Form 10-Q to report the adoption and termination of Rule 10b5-1 trading arrangements and other trading arrangements by directors, officers, and issuers, and the terms of such trading arrangements;
 - A requirement that Section 16 officers and directors disclose by checking a box on Forms 4 and 5 whether a reported transaction was made pursuant to a 10b5-1(c) trading arrangement; and
 - A requirement that Section 16 officers and directors report bona fide gifts of securities on Form 4 before the end of the second business day following the date of execution of the transaction, rather than on Form 5 under current rules.

The goal of these proposed amendments is to address perceived gaps in the SEC's insider trading regime and to foster greater confidence in the marketplace. Furthermore, the proposed amendments are intended to provide the market additional and timelier information on when and how insiders are trading in securities for which they may have material nonpublic information.

The proposed rule remains open for public comment³ for 30 days after publication in the Federal Register.

¹ <https://www.sec.gov/news/press-release/2021-256>; see also <https://www.sec.gov/rules/proposed/2021/33-11013.pdf>.

² <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.

³ Submit comments here: <https://www.sec.gov/cgi-bin/ruling-comments>; view comments here: <https://www.sec.gov/comments/s7-20-21/s72021.htm>.