
Rule 10b5-1 Plans Current Considerations

November 17, 2021

What are 10b5-1 Plans?

Section 10(b) and Rule 10b-5 of the Exchange Act prohibits the purchase or sale of a security “on the basis of” material non-public information

Rule 10b5-1 provides that a purchase or sale was made “on the basis of” material non-public information if the person making the purchase or sale was aware of the information

Rule 10b5-1 provides officers, directors and companies with an affirmative defense against allegations that they bought or sold company stock “on the basis of” of material non-public information if:

- A **written** plan is entered into for the purchase or sale of securities
- Plan was entered into when **not in possession of material non-public information**
- Plan sets out the **amount, price and date of the transactions** or provides a formula to determine it
- The person trading under the plan **did not exercise any judgment** once the plan is in place
- The plan was entered into in **good faith** and not as a plan to evade Rule 10b5-1
- The purchase or sale was **actually made under the 10b5-1 plan**

What are the benefits of a 10b5-1 plan?

Companies enter into 10b5-1 plans and many require officers and directors to enter into 10b5-1 plans to effect sales of company securities for the following reasons:

- 10b5-1 plans serve as an effective defense to insider trading allegations
- 10b5-1 plans provide more opportunities for officers and directors to sell their shares without pausing for blackout periods
- 10b5-1 plans provide greater certainty for officers and directors in connection with sales of securities
- 10b5-1 plans address public relations concerns associated with the timing of securities transactions
- Reduces burden on internal counsel/compliance who are required to make material non-public information determinations each time an insider seeks to buy or sell shares

What is wrong with 10b5-1 plans?

Concerns about the 10b5-1 plans have existed for years

- Congress, the media and academics have asserted for years that insiders use 10b5-1 plans to evade insider trading restrictions
 - There is a belief that officers and directors make opportunistic sales relying on 10b5-1 plans, taking advantage of known market or company events or announcements
 - The perception is that the 105b-1 plans were entered into with knowledge of material non-public information or not in good faith
- Bipartisan support exists for limiting the use of 10b5-1 plans and the protections afforded to officers, directors and companies in connection with transactions in company securities

What has the SEC said it is going to do?

In June 2021, SEC Chair Gensler, raised the following specific concerns related to 10b5-1 plans:

- *Waiting Period.* Should there be a waiting or cooling off period before a person can buy or sell securities once the person enters into a 10b5-1 plan?
- *Terminating a 10b5-1 Plan.* Should an officer, director or company be permitted to terminate a 10b5-1 plan when in the possession of material non-public information?
- *Multiple 10b5-1 Plans.* Should an officer, director or company be permitted to enter into multiple 10b5-1 plans at the same time, so they can cancel, amend or terminate specific 10b5-1 plans to get the best outcome?
- *Disclosure.* Should the adoption, amendment or termination of a 10b5-1 plan trigger a disclosure requirement? Like, an 8-K.

Chair Gensler has said that the SEC Staff is working on a rule proposal related to the questions he has raised.

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Prior to returning to the firm in 2017, Lona served in senior positions at the Securities and Exchange Commission for over four years. From 2013 to 2015, he served as Chief of Staff to SEC Chair Mary Jo White, where he was the top advisor to the Chair on all issues, including policy development, rulemaking, strategy and management. During this time, he led the rulemaking and implementation efforts related to all mandates under the Dodd-Frank and JOBS Acts and directed the SEC’s asset management, market structure, public company disclosure effectiveness and private offering reform programs. He also served as the SEC deputy to the Financial Stability Oversight Council and was the primary SEC liaison with other financial regulators. Lona joined the SEC in 2011 as Deputy Director of the Division of Corporation Finance and later became its Acting Director. In this role, he was responsible for the division’s overall activities and operations, including rulemaking, interpretive guidance and the public company filing review program. Following his SEC tenure, Lona joined Bridgewater Associates, LP, where he was the Chief Governance Officer and a senior advisor to founder Ray Dalio.

Lona first joined the firm in 1998 and became a partner in 2007.

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