

June 7, 2021

SEC Chair Statement on Rule 10b5-1 Trading Plans

SEC Chair Gensler's Speech Indicates Areas of Potential Rulemaking

On June 7, 2021, Securities and Exchange Commission Chair Gary Gensler released prepared remarks for the *CFO Network Summit* highlighting areas of potential rulemaking around Rule 10b5-1 trading plans.¹ Rule 10b5-1 trading plans have come under scrutiny in the past several years, with various commentators discussing the potential for abuse under those plans.² The prepared remarks highlight five areas in particular where we may expect to see future rulemaking or, even in certain cases, enforcement actions.

- *Cooling Off Periods.* Chair Gensler notes that there currently is no required cooling off period between adoption of a Rule 10b5-1 trading plan and the first trade under the plan. Notably, in highlighting that cooling off periods have received bipartisan support, he references the proposed four- to six-month cooling off period previously suggested by Commissioner Crenshaw. A four- to six-month cooling off period would be longer than periods generally recommended by practitioners, which typically are in the range of one to three months.
- *Cancellation of Trading Plans.* Chair Gensler has asked his staff to consider limitations on how and when trading plans may be terminated while an insider is in possession of material nonpublic information ("MNPI"). Because the termination of a trading plan does not involve a purchase or sale of a security, under current rules, terminating a plan while in possession of MNPI is not a violation of insider trading rules; however, this type of activity, particularly if more than an isolated one-time event or quickly followed by entry into a new plan, can call into question, in Chair Gensler's view, whether the trading plan has been entered into in good faith, a requirement for the affirmative defense provided for under Rule 10b5-1.
- *Public Disclosure of Trading Plans.* Chair Gensler highlights that there are no current requirements to publicly disclose the entry into Rule 10b5-1 trading plans, and he indicates that additional disclosure, including regarding the adoption, modification and terms of Rule 10b5-1 trading plans, could enhance investor confidence in the public markets.
- *Limitations on the Number of Plans That May Be Adopted.* Chair Gensler also notes that there currently are no limits on the number of plans that insiders may adopt, and he voices the concern

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that with the ability to enter into multiple trading plans and to cancel such plans at any time, “insiders might mistakenly think they have a ‘free option’ to pick amongst favorable plans as they please”.

- *Intersection with Public Company Share Buyback Programs.* Chair Gensler has requested that his staff look at other areas of potential reform, including the intersection of insider trading plans with public company share buyback programs. The prepared remarks do not provide any additional detail, although practitioners generally advise insiders to exercise caution when entering into trading plans at a time when the company itself is conducting a share buyback program, especially when the insider is involved in the company’s share buyback decisions.

Key Takeaway. Although current practices regarding Rule 10b5-1 trading plans reflect several of the topics described above, Chair Gensler’s comments serve as a good reminder of the importance of “good corporate hygiene” regarding trading plans.³

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ENDNOTES

- ¹ Chair Gensler’s prepared remarks are available at <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.
- ² Rule 10b5-1 under the Securities Exchange Act of 1934 sets forth an affirmative defense to liability under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder that a person’s purchase or sale is not on the basis of MNPI if the purchase or sale is effected pursuant to a written trading plan that meets certain requirements. These plans are often referred to as “Rule 10b5-1 trading plans”.
- ³ See former SEC Chair Clayton’s remarks to the Economic Club of New York, *available at* <https://www.sec.gov/news/speech/clayton-economic-club-ny-2020-11-19>.

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