
Investor Advisory Committee Recommends Rule 10b5-1 Reform

On August 26, 2021, the Investor as Owner Subcommittee (“Subcommittee”) of the Securities and Exchange Commission’s Investor Advisory Committee (“IAC”) issued [draft recommendations](#) regarding trading plans intended to meet the requirements of Rule 10b5-1 under the Securities Exchange Act of 1934 (“Exchange Act”). The IAC approved the draft recommendations at its meeting held on September 9, 2021.

The first set of recommendations proposes to limit the affirmative defenses of Rule 10b5-1. Pursuant to such Rule, a person with material nonpublic information about a company or its securities can still trade in the company’s securities if such trades are made under an effective Rule 10b5-1 trading plan. Citing research reporting that “some plans are used to engage in opportunistic trading behavior,” the Subcommittee recommended: (1) requiring a “cooling off” period of at least four months between the adoption or modification of a 10b5-1 plan and the execution of the first trade under the newly-adopted or newly-modified plan; and (2) prohibiting an insider or issuer from having more than one 10b5-1 plan in effect at any one time. The Subcommittee noted that such a cooling off period would ensure that an insider or issuer could not put in place a plan that trades in the same quarter as its adoption and that limiting the affirmative defense protections to a single plan “would signal to the market that a plan was entered into in good faith.”

The second set of recommendations proposes additional disclosure requirements. In particular, the Subcommittee recommended proxy statement disclosure of the number of shares covered under corporate 10b5-1 plans and 10b5-1 plans for each of the company’s “Named Executive Officers,” as well as disclosure on Form 8-K of the adoption, modification, or cancellation of 10b5-1 plans by an issuer or its affiliates, including the number of shares covered by such plans. The Subcommittee also recommended enhancing Form 4 disclosure. Specifically, it called for inclusion of the following additional fields: (a) a checkbox to indicate whether a specific trade was pursuant to a 10b5-1 plan, and (b) a field to indicate the date of the associated 10b5-1 plan adoption or modification. It also recommended expanding Form 4 disclosure requirements to apply to all companies with U.S.-listed securities, including foreign private issuers, which currently fall outside the scope of Section 16 (the section of the Exchange Act requiring Form 4 filings). Finally, the Subcommittee recommended requiring electronic submission of Form 144, which may currently be submitted in either paper or electronic form.

The draft recommendations largely align with Securities and Exchange Commission (“SEC”) Chair Gary Gensler’s [June 2021 remarks](#), particularly the proposals regarding a mandatory cooling off period, limits on the number of 10b5-1 plans that may be in effect at any one time, and mandatory disclosure of the adoption, modification, and terms of such plans. However, the draft recommendations do not address concerns raised by Chair Gensler regarding the intersection of 10b5-1 plans with share buybacks, or restrictions on canceling such plans while in possession of material nonpublic information. In prepared [remarks](#) before the IAC at its September 9 meeting, Chair Gensler stated, “I believe plans under Exchange Act Rule 10b5-1 have exposed potential gaps in our insider trading enforcement regime. As staff considers recommendations for changes to the rule, you’ve pointed out some important areas that are in line with what I’ve asked staff to consider in a proposed rulemaking.”

We anticipate that the SEC may propose rules in this area as early as fall 2021.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Kimberly Petillo-Décossard (partner) at 212.701.3265 or kpetillo-decossard@cahill.com; or Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or email publications@cahill.com.

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