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SEC Proposes New Rules on Rule 10b5-1 Plans and Share Repurchases

On December 15, 2021, the Securities and Exchange Commission (“SEC”) proposed new rules regarding Rule 10b5-1 plans and disclosure requirements for company share repurchases.

The proposal regarding Rule 10b5-1 plans would, among other things, add new conditions to the availability of the affirmative defense under Rule 10b5-1 and create new disclosure requirements for company insider trading policies, as well as for the adoption, modification and termination of Rule 10b5-1 plans by directors, officers and issuers.

The proposed share repurchase disclosure rules would require more frequent and timely disclosure of both open market and private repurchases of an issuer’s equity securities, including on a new Form SR for each day that an issuer or an affiliated purchaser makes a share repurchase.

Both the Rule 10b5-1 proposal and the share purchase proposal will be subject to an unusually short 45-day comment period that will expire in mid-February 2022. After the end of the comment periods, the SEC may be likely to move quickly to finalize rules – particularly in the case of the long-anticipated Rule 10b5-1 updates.

The proposal for the Rule 10b5-1 changes is available [here](#). The press release and the fact sheet can be found [here](#) and [here](#).

The proposal for the share repurchase disclosure changes is available [here](#). The press release and the fact sheet can be found [here](#) and [here](#).

Rule 10b5-1 Plans

Overview

The federal securities laws prohibit trading of securities by individuals in possession of material, non-public information (“MNPI”). For corporate executives, directors and other insiders with regular access to MNPI, trading in company securities is particularly challenging. Recognizing



these challenges, in 2000, the SEC adopted Rule 10b5-1, which created a safe harbor to enable the purchase and sale of securities by insiders through pre-established trading plans. Commonly known as a “Rule 10b5-1 plan”, these plans, if valid, establish an affirmative defense to insider trading allegations. To be valid, a Rule 10b5-1 plan must be entered in good faith and cannot be a plan or scheme to evade the prohibition against insider trading. Plans may only be entered when the insider is not aware of MNPI, and the insider (or any other person with MNPI) cannot exercise any subsequent influence over how, when or whether to effect purchases or sales. Rule 10b5-1 plans have been widely used by company insiders, as well as by issuers repurchasing stock, in the two decades since the SEC adopted the rule.

Criticism

Rule 10b5-1 plans have been scrutinized since the adoption of the rule, with critics arguing that the affirmative defense can be abused and manipulated to allow opportunistic trading using MNPI. Calls for Rule 10b5-1 reform have gained momentum in the last year. In September 2020, former SEC Chair Jay Clayton wrote that certain Rule 10b5-1 plan practices “...raise questions of interest alignment and fairness,” recommending that plans include mandatory waiting periods.¹ Last February, Senators Elizabeth Warren, Sherrod Brown, and Chris Van Hollen urged the SEC to reform policies regarding Rule 10b5-1 plans. Senator Van Hollen introduced bipartisan legislation to study and amend Rule 10b5-1 in June 2021.² Earlier that month, current SEC Chair Gary Gensler stated that Rule 10b5-1 plans “have led to real cracks in our insider trading regime” and asked his staff to recommend changes to “freshen up Rule 10b5-1 plans.”³ The SEC’s Investor Advisory Committee announced their recommended changes to Rule 10b5-1 plans this past fall.

On December 15, 2021, the SEC voted unanimously to propose new rules on Rule 10b5-1 plans.

The Proposed Changes

Conditions

The proposed amendments add the following conditions to the availability of the Rule 10b5-1(c) affirmative defense:

- Plans adopted or modified **by officers or directors** must include a **120-day** “cooling-off” period before trading can commence under the plan.
- Plans adopted or modified **by companies** must include a **30-day** “cooling-off” period before trading can commence under the plan.
- When adopting a Rule 10b5-1 plan, officers and directors must certify in writing that (1) they are not aware of any material non-public information about the company and its securities and (2) they are adopting the plan in good faith and not as a plan to evade the prohibitions of Rule 10b5-1.
- Plans to execute a single trade are limited to one plan per 12-month period.

The proposed amendments also provide that the Rule 10b5-1(c) affirmative defense does not apply to multiple overlapping plans in the same class of securities. The restriction on multiple overlapping 10b5-1 trading arrangements is designed to prevent persons from devising schemes to exploit inside information by setting up pre-existing hedged trading programs, and then canceling execution of the unfavorable side of the hedge, while permitting execution of the favorable transaction.



Enhanced Disclosure Requirements

The proposed amendments would also mandate disclosures regarding Rule 10b5-1 plans and other trading arrangements. Under the proposed rules, companies would be required to make the following disclosures:	
Form 10-K	<ul style="list-style-type: none"> Whether insider trading policies and procedures have been adopted (and if not, why). If insider trading policies and procedures have been adopted, they must be disclosed, and this disclosure should be “detailed and meaningful.” The adoption or termination of any Rule 10b5-1(c) plans made by directors, officers or the company during the last fiscal quarter, as well as the material terms of such plans (including the name and title of the director or officer, the date of adoption or termination, the duration of the plan and the aggregate number securities to be sold or purchased under the plan).
Form 10-Q	<ul style="list-style-type: none"> The adoption or termination of any Rule 10b5-1(c) plans made by directors, officers or the company during the last fiscal quarter, as well as the material terms of such plans (including the name and title of the director or officer, the date of adoption or termination, the duration of the plan and the aggregate number securities to be sold or purchased under the plan).
Annual Proxy Statements	<ul style="list-style-type: none"> Tabular disclosure showing grants of stock options made within 14 days of the release of material nonpublic information (through the filing of a periodic report, the adoption of a buyback plan or reporting MNPI on Form 8-K, including earnings) with specified information, including the market price of the underlying securities on the trading day before and after the release of such information. Narrative disclosure in Compensation Discussion and Analysis about option granting policies and practices regarding the timing of option grants and the release of MNPI, including how the board determines when to grant options and whether and how MNPI is taken into account.
Form 4 / Form 5	<ul style="list-style-type: none"> Section 16 filers must check a box on Form 4 and Form 5 if any reported transaction was made under a Rule 10b5-1 plan. Filers would also be required to provide the date of adoption of the Rule 10b5-1 trading arrangement. Section 16 filers must disclose bona fide gifts (but not receipt) of securities on Form 4 before the end of the second business day following the date of execution of the transaction.

Share Repurchase Disclosure

Overview

Companies are currently required to disclose certain specified information about share repurchases on a quarterly basis in periodic reports. For the relevant quarter, companies must disclose in a tabular format (1) the total number of shares purchased as part of a publicly announced repurchase plan or program, reported on a monthly basis and by class, (2) the total number of shares purchased, (3) the average price paid per share, and (4) the maximum number of shares yet to be purchased under the plans or programs, in addition to footnote disclosure of the principal terms of all publicly announced share repurchase programs.



Criticism

As share repurchases have increased in recent years, critics have identified a need to strengthen share repurchase disclosure requirements by requiring more detailed and timely disclosure. Critics argue that the current reporting scheme lacks transparency, which could allow companies and corporate insiders to manipulate earnings per share, strategically plan share repurchases during periods where companies consider their shares undervalued and take advantage of the favorable share prices that often coincide with share repurchases. In June 2021, Chair Gensler asked his staff to consider potential changes to enhance transparency related to stock buybacks.⁴

On December 15, 2021, the SEC approved the proposal by a vote of 3-2. Commissioner Peirce and Commissioner Roisman both issued dissenting statements, with Peirce describing the proposed rules as including “painfully granular, unnecessary frequent disclosure obligations.”⁵ Taken together with the proposed cooling-off period under Rule 10b5-1, the proposed rules requiring daily reporting plus enhanced disclosures create a number of potential issues for companies.

The Proposed Changes

New Form SR

The proposed amendments would require share repurchases to be reported on a new Form SR, which must be furnished (not filed) within one business day. The information to be provided on Form SR would include:

- Average price paid per share;
- Aggregate number of shares purchased on the open market;
- Aggregate number of shares purchased under the safe harbor in Exchange Act Rule 10b-18; and
- Aggregate number of shares purchased under a Rule 10b5-1 plan.

It is unclear how the proposed reporting regime would apply to repurchases pursuant to an accelerated share repurchase program.

Revised Periodic Reporting Disclosure Requirements

The proposed amendments would also revise Item 703 of Regulation S-K to require the following disclosures in Forms 10-Q and 10-K:

- The objective or rationale for share repurchases and the process or criteria used to determine the amount of repurchases;
- Policies and procedures relating to purchases and sales of the issuer’s securities by officers or directors during a share repurchase program, including any applicable restrictions;
- Whether repurchases were made pursuant to a Rule 10b5-1(c) plan, and, if so, the date the plan was adopted or terminated; and
- Whether repurchases were made in reliance on the Exchange Act Rule 10b-18 non-exclusive safe harbor.

Issuers would also be required to check a box if any Section 16 insiders traded in company stock within the 10 business days preceding or following the announcement of an issuer repurchase plan or program.



Takeaways

If and when approved, the requirements of the new and revised rules regarding Rule 10b5-1 plans and company share repurchases will implicate several everyday corporate practices. In advance of final rules being adopted, companies should survey existing policies and procedures. Particularly in the case of Rule 10b5-1 plans where we have seen general bipartisan support and the SEC is expected to move quickly to adopt final rules, companies should consider incorporating key aspects of the proposed rules into current practices.

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¹ Letter from Jay Clayton, Chair, Sec. & Exch. Comm'n to Rep. Brad Sherman, Chairman, U.S. House Subcomm. on Investor Protection, Entrepreneurship and Capital Markets (Sept. 25, 2020).

² Letter from Senators Elizabeth Warren, Sherrod Brown, and Chris Van Hollen to Allison Herren Lee, Commissioner, Sec. & Exch. Comm'n (Feb. 10, 2021), <https://www.warren.senate.gov/oversight/letters/senators-warren-brown-and-van-hollen-urge-sec-to-strengthen-and-enforce-insider-trading-rule>; Press Release, Senator Chris Van Hollen, Van Hollen, Fischer Introduce Bipartisan Bill to Require Transparency in Corporate Stock Trading (June 24, 2021), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-fischer-introduce-bipartisan-bill-to-require-transparency-in-corporate-stock-trading>.

³ Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks CFO Network Summit (June 7, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.

⁴ Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks at London City Week (June 23, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.

⁵ Hester M. Pierce, Commissioner, Sec. & Exch. Comm'n, Dissenting Statement on Buybacks Disclosure Proposal (Dec. 15, 2021), <https://www.sec.gov/news/statement/peirce-buyback-20211215>.