

Considerations for Rule 10b5-1 Plans

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When we wrote that Rule 10b5-1 plans were back in the news in our [January memo](#), it turns out that this continues to be accurate even now as the *Wall Street Journal* recently [reported](#) on the Council of Institutional Investors' follow-up [letter](#) urging the SEC to regulate these trading plans. Richard Sandler in our capital markets practice discusses some of the main issues surrounding these plans and the CII proposal.

- *Initial adoption of plans.* What should companies consider in terms of allowing executives to adopt these plans? Since the benefits of Rule 10b5-1 are only available if an insider adopts a plan while not in possession of any material nonpublic information, the window period immediately after the company announces earnings would be the best time for executives to adopt plans. CII asks that the SEC permit insiders to adopt plans only during open trading windows. In addition, CII would like the SEC to ban the ability to adopt multiple, overlapping plans.

- *Waiting period before first trade.* Is a waiting period before the first trade under the plan recommended? While a delay is not required, a waiting period after adoption, and before the first trade, is viewed as a good risk management strategy. The purpose of the waiting period is to help support a conclusion that no trading took place based on inside information.

There is some debate as to how long the waiting period needs to be. While the CII recommendation is for three months or more, this is a longer time period than most practitioners would employ. Current practice varies from 10 days to the next open window.

- *Modifications to the plans.* What are the concerns with permitting modifications or amendments to the plan? The CII proposal would prohibit frequent modifications or cancellations of 10b5-1 plans. It is hard to argue that a constant pattern of plan amendments and modification may not be problematic. If the amendments are extensive, consideration should be given as to whether it becomes akin to adopting a new plan that should have the same safeguards discussed above.
- *Termination or cancellation of the plans.* What if an executive changes his or her mind and would like to terminate a plan? A plan can be terminated or suspended at any time, even if an insider has material nonpublic information. In our experience, an executive may wish to terminate a plan before impending bad news to avoid looking like his sales were affected by the news, even if his plan was put into place way before. In the event of a termination, companies need to give careful thought as to when it would be appropriate to put another plan in place.
- *Disclosure of the plans.* Should companies disclose that their executives have entered into 10b5-1 plans? CII would like companies to disclose adoptions, amendments, terminations and transactions. Currently, companies take different approaches as to announcing the initial adoptions of plans. We suggest that Form 4s disclosing sales under the plans indicate that those sales are made pursuant to a 10b5-1 plan.

- *Oversight by the company.* What kind of oversight mechanisms should companies have in place? We believe that at a minimum, most companies require pre-approval of an executive's entry into a plan, if not pre-approval of the plan itself. Some companies consider imposing certain limits regarding the percentage of holdings that can be subject to the plan, establishing rules for setting price floors, or disallowing certain types of plans that give brokers the ability to determine whether, how and when to make purchases. Not surprisingly, CII is seeking expansive board involvement, including having boards adopt policies covering plan practices, monitor plan transactions and ensure that the policies are consistent with any hedging, holding and ownership requirements.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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