

[Securities Regulation Daily Wrap Up, TOP STORY—Gensler eyes new limits on Rule 10b5-1 trading plans, \(Jun. 7, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

The SEC chair highlighted four issues with Rule 10b5-1 plans that have caused "cracks" in the insider trading regime.

At today's [CFO Network Summit](#), SEC Chair Gary Gensler announced that the staff will be preparing recommendations on shoring up Rule 10b5-1 for trading plans by insiders. Gensler specified [four aspects](#) of the rules for such trading plans that may undermine investor confidence or allow a "loophole" for bad actors. He also stressed that even under the current rules, amending or canceling a plan may call into question whether it was entered into in good faith and thus provides a safe harbor.

Gensler said that Rule 10b5-1, which provides an affirmative defense for corporate insiders who trade stock under plans entered into in good faith and before learning of material information, have "led to real cracks in our insider trading regime." The official said he has asked SEC staff to make recommendations on how to update the 20-year-old rule, particularly with respect to four specific reforms.

Waiting periods. First, Gensler pointed to the absence of any cooling off period between adoption of a trading plan and the first securities trade. He cited [research](#) finding that 14 percent of plans begin trading in the first 30 days, and 39 percent in the first 60 days. In his view, bad actors may perceive the absence of a waiting period as a loophole to trade on inside information.

Gensler said that the idea of a four- to six-month cooling-off period has received bipartisan support in the past and deserves further consideration. Last September, then-Chairman Jay Clayton wrote to Rep. Brad Sherman (D-Cal) and urged companies to voluntarily adopt waiting periods. Commissioners Caroline Crenshaw and Allison Herren Lee have also expressed support for shoring up the rules on insider trading plans.

Limits on cancelation. The SEC Chair also said that insiders' ability to cancel a plan without limitation, including when they possess material nonpublic information, "seems upside-down" and may undermine investor confidence. Material nonpublic information may influence the insider's decision to cancel a sell order, which may be as significant as carrying out a transaction. Gensler has asked staff to consider limitations on how and when a trading plan can be canceled.

Mandatory disclosure. A third factor is the absence of any mandatory disclosure regarding Rule 10b5-1 trading plans. Gensler believes that disclosure of companies' and individuals' adoption and modification of trading plans, and the terms of those plans, could enhance investor confidence.

Limits on number of plans. Finally, Gensler said that insiders can adopt an unlimited number of 10b5-1 plans and, combined with the ability to cancel plans, may believe they have the option to trade under whichever plan is most favorable. He has asked staff to consider whether there should be a limit on the number of trading plans.

The official also asked staff to examine other potential reforms, including the intersection of the rule with stock buybacks. The Promoting Transparent Standards for Corporate Insiders Act ([H.R. 1528](#)), which passed the House easily and has been referred to the Senate Banking Committee, would also require the SEC to study some of these aspects of 10b5-1 plans. Agency staff would consider whether Rule 10b5-1 should be amended to (1) limit trading plans to a time when the issuer or insider is allowed to trade securities during issuer-adopted trading windows; (2) limit the ability to adopt multiple trading plans; (3) establish a mandatory cooling-off period; (4) restrict how often a company or insider may modify or cancel trading plans; (5) require that trading plans and transactions be filed with the Commission; or (6) require greater board oversight of trading plans.

Gensler emphasized that even under current rules, canceling or amending a plan may call into question whether the plan was entered into in good faith. If it was not, the insider or company cannot use the plan as an affirmative defense to insider trading.

Upcoming advisory committee meeting. The SEC's Investor Advisory Committee [meeting on June 10](#) will include a panel discussion regarding 10b5-1 plans. The panel, which begins at 2:30 Eastern time, will be moderated by Cambria Allen-Ratzlaff, Corporate Governance Director, UAW Retiree Medical Benefits Trust and feature panelists Keir Gumbs of Uber Technologies, Jeff Mahoney of the Council of Institutional Investors, and Dan Taylor of The Wharton School at the University of Pennsylvania. (Taylor co-authored the research Gensler cited concerning plans' cooling-off periods.)

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